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In the

United States Circuit Court of Appeals

For the Ninth Crcuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

Upon Appeal and Cross-Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Brief of Appellee and Cross-Appellant

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Northern Life Tower,
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Merchants Printing Co., Seattle

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INDEX

Index of Assignments of Error Discussed v

Table of Cases ix

Statutes xv

Texts and Miscellaneous xvi

Additional Statement of the Case 1

Supreme Court's Opinion in Northern Pacific Raliway Co. v. Sauk River Lumber Co. 11

Brief of Answering Argument 18

Conclusion 203

ASSIGNMENT INDEX

Assignment Number	Page in Appellant's Brief Where Error Is Argued	Page in Appellee's Brief Where Appellant's Argument Is Answered
1	352	27
2	373	38
3	392	48
4	247, 256	60
5	256, 283	60, 69
6	256, 284	60, 69
7	256, 284	60, 69
8	256, 284	60, 70
9	256, 285	60, 70
10	256, 285	60, 70
11	256, 285	60, 70
12	256, 285	60, 70
13	256, 287	60, 70
14	256, 287	60, 71
15	256, 289	60, 71
16	256, 289	60, 71
17	256, 290	60, 71
18	256, 290	60, 71
19	256, 291	60, 72
20	256, 292	60, 72
21	256, 292	60, 72
22	256, 293	60, 72
23	125, 137, 146, 159, 172, 181, 192, 212, 247	77
24	125, 137	124
25	159, 166, 181	125
26	192, 201	126
27	125	127
28	212, 216	128
29	212	129
30	137	130
31	181	131
32	172	131

ASSIGNMENT INDEX—Continued

Assignment Number	Page in Appellant's Brief Where Error Is Argued	Page in Appellee's Brief Where Appellant's Argument Is Answered
33	212, 216	132
34	146, 154, 192, 200, 218	136
35	212, 216	137
36	336	138
37	159, 167, 181	139
38	159, 166, 181	140
39	181	141
40	212, 216, 347	142
41	301	143
42	302	143
43	301	143
44	301	143
45	301	143
46	201	149
47	309	143
48	349	150
49	322	153
50	302	143
51	322	161
52	303	144
53	256, 313	162
54	256, 295, 311	175
55	125	175
56	334, 344	175
57	125, 335	177
58	344, 345	179
59	344	179
60	125, 137, 146, 159, 172, 181, 192, 212, 247	180
61	247, 256	180
62	256, 283	180
63	256, 284	180
64	256, 284	180
65	256, 284	180
66	256, 285	180

ASSIGNMENT INDEX—Continued

Assignment Number	Page in Appellant's Brief Where Error Is Argued	Page in Appellee's Brief Where Appellant's Argument Is Answered
67	256, 287	180
68	258, 287	181
69	256	181
70	256, 288	181
71	256, 289	181
72	256, 290	181
73	256, 290	181
74	256, 291	181
75	256, 291	181
76	256, 292	181
77	256, 292	181
78	256, 293	181
79	256, 316	182
80	256, 316	182
81	256, 323	182
82	256, 323	183
83	256, 325	184
84	256, 325	184
85	326	185
86	351	186
87	146, 337	187
88	146, 338	187
89	137, 339	188
90	137, 339	188
91	159, 340	188
92	212, 253, 341	189
93	212, 253, 341	190
94	212, 253, 256, 318, 342	190
95	125, 256, 318	190
96	192	191
97	192	191
98	346	191
99	256, 318	192
100	256, 318	192
101	256, 318	192

ASSIGNMENT INDEX—Continued

Assignment Number	Page in Appellant's Brief Where Error Is Argued	Page in Appellee's Brief Where Appellant's Argument Is Answered
102	256, 318	192
103	256, 318	192
104	256, 318	192
105	256, 318	192
106	176	193
107	176	194
108	172	194
109	346, 349	195
110	346	195
111	346	197
112	172	198
113	172	199
114	318	200
115	212	201
116	192	202
117	172	202
118	304	144

TABLE OF CASES

Page

Alabama Water Co. v. City of Attalla, 100 So. (Ala.) 490 66

American Surety Company of New York v. Scott, 63 F. (2d), 961 (C. C. A. 10th) 55

Arizona Wholesale Grocery Co. v. Southern Pac. Co., 68 F. (2d) 601, (C. C. A. 9th) 32

Armour Packing Co. v. United States, 209 U. S. 56, 28 S. C. R. 428 ..... 117, 120

A. T. & S. F. R. Co. v. Spiller, 246 F. 1 108

Atlantic Coast Line R. Co. v. Florida, 79 L. Ed. 719 105

Bacon v. Rutland R. Co., 232 U. S. 134, 34 S. Ct. R. 283 62

Baltimore etc. Co. v. Hamburger, (C. C.) 155 F. 849 111

Batesville Telephone Co. v. Public Service Commission of Indiana, 38 F. (2d) 511 67

Batani, In re, 6 F. Sup. 376 46

Baxter v. Scoland, 2 Wash. Ter. 86, 3 Pac. 638 50

Belcher v. Tacoma & Eastern R. Co., 99 Wash. 34 54

Bevan v. Krieger, 289 U. S. 459, 53 S. C. R. 661 ..... 46, 47

Bignold v. Carr, 24 Wash. 413, 64 Pac. 519 50

Blaser v. Fleck, 189 Pac. (Ore.) 637 57

Blue Point Oyster Co. v. Haagenson, 209 F. 278 135

Brooks v. Town of Potomac, 141 S. E. (Va.) 249 48

Bushnell v. Yoshika Tashiro, 2 Pac. (2d) 550 164

Clark v. Southern Railway Co., 119 N. E. (Ind.) 539 111

C. M. & St. P. & P. R. Co. v. Campbell River Mills, 53 F. (2d) 69 ..... 17, 36, 37

Coad v. Chicago, etc., Ry. Co., 154 N. W. 396 109

Cowley v. Northern Pacific Ry. Co., 68 Wash. 558 133

Davis v. Portland Seed Co., 264 U. S. 408, 44 S. C. R. 380 107

Page

Davison v. Rake, 16 Atl. (N. J.), 227, 18 Atl. 752 59

Devlin v. Moore, 130 Pac. 35 57

Dryden v. Sewell, 2 Alaska 182 ..... 50, 51

Dugan v. State of Ohio, 277 U. S. 61, 48 S. C. R. 439 45

Eisenman v. Austen, 169 Atl. (Me.) 162 163

Fisher Flour Mills v. United States, 17 F. (2d) 232 125

Flanagan V. Drainage Dist. No. 17, 2 S. W. (2d) (Ark.) 70 50

Ft. Morgan Bean Co. v. Chicago, etc. R. Co., 288 Pac. (Kan.) 589 109

Gallagher v. Town of Buckley, 31 Wash. 380 ..... 71, 160

Geddis v. Bank, 145 Atl. (N. J.) 731 104

Georgia F. & A. R. Co. v Blish Milling Co., 241 U. S. 190, 36 S. C. R. 541 103

Glen Falls Portland Cement Co. v. Delaware & Hudson Co., 66 F. (2d) 490 66

Great Northern Ry. Co. v. Department of Public Works, 161 Wash. 29 ..... 62, 64, 65, 68, 70, 71, 72

Harris v. Johnson, 75 Wash. 291 58

Hill v. State, 298 S. W. (Ark.) 321 48

Hurst v. W. J. Lake & Co., 16 Pac. (2d) (Ore.) 627 81

In re Alleged Unlawful Charges, 8 I. C. C. 585 113

In re Volland, 69 F. (2d) 475 44

Jenckes Spinning Co. v. New York, etc., Co., 129 Atl. (R. I.) 815 103

Johns v. Clother, 78 Wash. 602, 139 Pac. 755 101

Johnson v. Anderson, 61 Wash. 100 155

Jordan v. Corbin Coals, Ltd., 162 Wash. 503 102

Karp v. Herder, 81 Wash. Dec. 511 ..... 163, 164, 173

Page

Kelley v. Department of Labor & Industries, 172 Wash. 525.....146

Lehigh Valley R. Co. v. Meeker, 211 Fed. 785..... 74

Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 17, 46 S. C. R. 73.....108

Macfadden v. Alabama Great Southern R. Co., 241 F. 562.....111

Maxey v. Railey & Bros. Banking Co., 57 S. W. (2d) (Mo.) 1091 163

McMullen v. Warren Motor Co., 174 Wash. 454.....173

Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 S. C. R. 328, 59 L. Ed. 644.....53, 169

Mellon v. Johnson Co., 219 N. W. (Wis.) 352.....93, 103

Melody v. Great Northern Ry. Co., 127 N. W. (S. D.) 543..... .....103, 122

Mutual Life Insurance Co. v. Maddox, 128 So. (Ala.) 383.....163

Nappa Valley Electric Co. v. Railroad Commission of Cal., 257 F. 197 62

Northern Pacific R. Co. v. Baker, 3 F. Sup. 1.....63, 65

Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co., 4 F. (2d) 359 120

Northern Pacific Railway Co. v. Sauk River Lumber Co., 160 Wash. 691, 295 Pac. 926..... .....11, 31, 37, 48, 63, 79, 84, 87, 92, 98, 125, 178

New York & Pennsylvania Co. v. New York Central R. Co., 110 Atl. (Pa.) 286 53

New York & Pa. Co. v. New York Central R. Co., 126 Atl. (Pa.) 382 67

New York Life Insurance Co. v. Beason, 155 So. (Ala.) 530.....163

O'Dea v. Amodeo, 170 Atl. (Conn.) 486.....166

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. C. R. 527 62

Paepcke-Leicht Lumber Co. v. Talley, 153 S. W. (Ark.) 833..... 81

Page

Pennsylvania Fire Insurance Co. v. Gold Issue etc. Co., 243 U. S. 93, 37 S. C. R. 344 94

Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184 33 S. Ct. 893 ..... 79, 107

People v. Cassiday, 117 Pac. (Colo.) 357 18

People's Fruit & Veg. Shippers' Assn. v. Illinois Commerce Commission, 184 N. E. (Ill.) 615 ..... 37, 65

Pitt v. Southern Pacific Co., 9 Pac. (2d) 273 164

Prendergast v. New York Telephone Co., 262 U. S. 43, 43 S. C. R. 466 62

Prentis v. Atlantic Coast Line Co., 29 S. C. R. 67 63

Producers' Trans. Co. v. Railroad Commission of Cal., 251 U. S. 228, 40 S. C. R. 131 103

Public Service Commission v. City of Indianapolis, 137 N. E. (Ind.) 705 66

Puget Sound Electric R. R. Co. v. Lee, 207 F. 860 62

Robinson v. Wolverton Auto Bus Co., 163 Wash. 160 ..... 93, 103

Russell v. Mutual Lumber Co., 134 Wash. 508, 236 Pac. 96 101

Schwede v. Hemrich, 29 Wash. 124 155

Seaman v. Minn. & R. R. Ry. Co., 149 N. W. (Minn.) 134 ..... 103, 119

Sifers v. Walch, 195 N. W. (Iowa) 185 50

Simon v. Trummer, 110 Pac. 786 (Ore.) 57

Southern Indiana R. Co. v. Railroad Commission of Indiana, 87 N. E. (Ind.) 960 66

Southern Pacific Co. v. Darnell Taenzer Lumber Co., 245 U. S. 531, 38 S. C. R. 186 108

Southern Pacific Ry. Co. v. Frye & Bruhn, 82 Wash. 9 134

Stanhope v. Strang, 140 Wash. 693 183

State v. Bolen, 142 Wash. 653 153

Page

State v. Maxwell, 1 N. W. (Iowa) 666 150

State ex rel Chicago, Milwaukee & St. Paul Ry. Co. v. Public Service Commission, 94 Wash. 274 53

State ex rel v. Department of Public Works, 149 Wash. 129 ..... 87, 92

State ex rel G. N. Ry. Co. v. Public Service Commission, 76 Wash. 625 34

Steinman v. Clinchfield Coal Corp., 93 S. E. (Va.) 684 17

Stotts v. Puget Sound Traction Light & Power Co., 94 Wash. 339, 162 Pac. 519 56

Stratford v. Fidelity & Casualty Co., 137 Atl. (Conn.) 13 104

Sturgis v. Baker, 43 Ore. 236, 72 Pac. 744 57

Suffern Hunt & Co. v. Indiana, Decatur & Western R. Co., 7 I. C. C. 255 112

Sultan R. & T. Co. v. Great Northern Railway Co., 58 Wash. 604 120

Sunset Pacific Oil Co. v. Los Angeles, etc., Co., 290 Pac. (Cal.) 434 109

Tacoma Grain Co. v. V. P. Ry. Co., 123 Wash. 664, 213 Pac. 22 52

Texas Electric Service Co. v. City of Seymour, 54 F. (2d) 97 44

Texas Steel Co. v. Fort Worth & D. C. R. Co., 45 S. W. (2d) (Texas) 794 66

Tonopah Sewer & Drainage Co. v. Nye County, 254 Pac. (Nev.) 696 ..... 66, 87, 93

Triphonoff v. Sweeney, 130 Pac. 979 (Ore.) 57

Tumey v. Ohio, 273 U. S. 510, 71 L. Ed. 749, 47 S. C. R. 437 42

Turner v. Spokane County, 150 Wash. 524 102

Union Wire Rope Corp. v Atchison, etc. Ry. Co., 66 F. (2d) 965 83

U. S. v. Skinner & Eddy Corp. 5 F. (2d) 708 (D. C. Wash.) 55

TABLE OF CASES—Continued

Page

U. S. v. Skinner & Eddy Corp. 28 F. (2d) 373 (D. C. Wash.)..... 55

U. S. v. Skinner & Eddy Corp. 35 F. (2d) 889 (C. C. A. 9th)..... 55

Vanderberg v Detroit & C. Nav. Co., 186 N. W. (Mich.) 477.....111

Walker v. Baxter, 6 Wash. 244, 33 Pac. 426.....101

Warren, S. D., Co. v. Maine Central R. Co., 135 Atl. (Me.) 526 66

Western New York etc. v. Penn. Refining Co., 137 F. 343.....53, 73

Western R. Co. of Alabama v. Montgomery County, 153 So. (Ala.) 622 .....67, 77

West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co., 15 S. W. (2d) (Texas) 558..... 66

Wheeler, J. R., Co. v. Director General, 59 I. C. C. 699.....113

Willapa Power Co. v. Public Service Commission, 110 Wash. 193 .....61, 65

Yowell v. Cleveland C. C. & St. L. R. Co., 195 N. E. (Ill.) 667..... 65

STATUTES

Page

Rem. Rev. Stat. § 179 ..... 55, 56
§ 196 56
§ 259 ..... 28, 50
§ 263 50
§ 297 156
§ 5509 41
§ 5510 41
§ 10350 ..... 79, 87, 103, 110, 127, 184
§ 10354 ..... 106, 111
§ 10356 106
§ 10422 107
§ 10433 ..... 39, 40, 73, 107
§ 10435 ..... 40, 51, 52
§ 10436 ..... 40, 41
§ 10448 78
§ 10450 78
§ 10776 41
§ 10779 39
§ 10784 39
§ 10896 41
§ 10939-3 39

L's 1911, Ch. 117, §§86, 89 ..... 62, 64
p. 548 79
p. 600, §91 ..... 39, 40

L's 1921, p. 18, §21 39
L's 1921, p. 336 40
pp. 336-7, §§2, 3 40
p. 337, §6 53
L's 1923, p. 192, §3 39
U. S. C. A. Title 28, §724 28
U. S. C. A. Title 49, §16 (1-2) 61

TEXTS AND MISCELLANEOUS

Page

Annotation, 13 A. L. R. 289 55
Simpkin's Federal Practice (Rev. Ed.), §25, p. 27 57
12 C. J. 902 52
21 C. J. 1142 102
22 C. J. 514 153
22 C. J. 531 152
22 C. J. 597 152
22 C. J. 1204 80
23 C. J. 58 128
23 C. J. 124 128
25 C. J. 832 18
33 C. J. 1064 52
34 C. J. 1009-11 58
47 C. J. 34 ..... 57, 58
62 C. J. 112 155
64 C. J. 249 159
64 C. J. 267 159

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Brief of Appellee and Cross-Appellant

ADDITIONAL STATEMENT OF THE CASE

Appellant's voluminous brief seeks to have this court reverse the judgment below, to direct either dismissal or a new trial. Points 1, 8, 9 and 10 are principally directed to arguments seeking a dismissal

and points 2 to 7 inclusive are principally directed to obtaining a new trial.

Appellant, for purposes of convenience, has grouped its various specifications of error under ten principal headings. While this method has some advantages, the determination of this appeal will ultimately involve the question whether any of the assignments or specifications of error are well taken. In view of the fact that appellant in its brief, pages IV to VII, inclusive, has set opposite each assignment of error the page of the transcript where error and exception is shown, and the page of the brief where the error is considered, we shall examine each of the errors claimed, using that index for the purpose of ascertaining appellant's contentions and answering the same. (All contentions not argued under a specific assignment of error must be deemed waived.) While this may involve some duplication of argument, effort will be made to reduce this duplicaton to a minimum. It is felt necessary, however, in order that a clear presentation of the errors claimed and the answers thereto may be made. Where assignments can be properly grouped, that will be done.

The following general observations may be made concerning the appellant's brief before considering matters of detail:

(1) It seeks to enforce an interpretation of *joint* tariff 51 not followed by other carriers.

(2) It fails to present all important testimony on the subjects of argument.

(3) In argument it fails to attach any weight whatsoever to the legal principles decided in the case of *Northern Pacific Railway Company v. Sauk River Lumber Company,* 160 Wash. 691, 295 Pac. 926, despite the fact that those principles are of highest importance in this case.

(4) Finally, it fails in nearly all instances, as will be pointed out, to cite cases in point on propositions discussed, as distinguished from excerpts which appear to be superficial authority for the propositions urged. Particularly does it fall in error in treating the law applicable to this case as if what was involved was a reparation order under Interstate Commerce Commission Act.

The sole question, about which many subsidiary questions raised by appellant are grouped, is: Does the term "board measure" as applied to logs, mean board measure determined by the Commercial Scale or by the Northern Pacific Scale under Tariff 51? The jury found that it meant the former. In reaching this verdict, the jury had a right to believe, and undoubtedly did believe, the following matters:

1. That even the Northern Pacific's own scaling method resulted in the carrying of parts of logs "free of charge," e. g. bark, burns, rotten sap, half the hollows (Tr. 117) and breaks (Tr. 240). In addition there was a certain amount of wood which even the application of the railroad's Scribner Decimal C Scale would not measure. Thus, since the rule required the measurement of the diameter of the log at the small end, wood contained in the log as the result of taper would not be measured and no freight paid therefor. Hence, the sawcut at the mill would overrun the Scribner Scale. (See Tr. 112). Hence, we have an illustration of a scale rule voluntarily applied by the railroad in which rates are calculated on the basis not measured by the amount of material transported. It is to be assumed that in fixing the rates, account was taken of that fact. Payment would in reality be made for all the material shipped, even though in form payment would only appear to be made for the material measured.

(Compare statements in Appellant's Brief, pages 4, 9, 11.)

2. The Commercial Scale was in use between buyer and seller of logs in the various logging districts, namely, Grays Harbor, Puget Sound, Columbia River and British Columbia (Tr. 117), and the same kind

of deductions for the same kind of defects are made (Tr. 117). While the formula for computing the gross content of the logs used in the Grays Harbor district is the so-called "Spalding Rule," as distinguished from the Scribner Decimal C Rule, the rules applied result in almost the same gross scale (Tr. 239). (Here the carrier and shipper use the Scribner C Scale).

Furthermore, the Commercial method of scaling is used in sales of stumpage and logs of all kinds and is used by the United States Government in the scale of its timber (Tr. 236). As has been true for many many years a cull is rejected under the Commercial scale. The definition of a cull has been the same throughout this time (Tr. 235, 239). Furthermore the Commercial Scale is used in computing freight charges by the Chicago, Milwaukee & St. Paul Railway and the Great Northern Railway (Tr. 250, 261, 264, 265).

In this connection it should be pointed out that the Commercial Scale figures used by the shipper in this case is merely a resort to the only proof available to the shipper of what the overcharges were. It is not contended by appellee that the Northern Pacific must use the Puget Sound Log Scaling Bureau to scale logs shipped, as might be inferred from the

manner of appellant's argument (App. Br. 8). The jury's verdict in favor of the shipper for the full amount claimed indicates its belief that the amount of over-scale claimed by shipper is correct, and that is of course binding on the parties.

(Compare statements appellant's brief 8, 9, 12.)

3. The compromise agreement of September 24, 1925, known as the Long-Woodworth agreement (Tr. 180), relied on by appellant to create an estoppel against shipper's claim for refund, made no reference to the scaling practice whatsoever (Tr. 200). Indeed, at the time of the agreement, Mr. Long, representing the loggers, was employed by the Weyerhaeuser Timber Company, one of whose subsidiaries (Cherry Valley Logging Company) was shipping over the Chicago, Milwaukee & St. Paul Railway (Tr. 279). The Milwaukee at that time was undoubtedly using the Commercial Scale in assessing freight charges on log shipments, as was a justifiable inference from the evidence (Tr. 250, 261, 264, 265). He must have assumed, in view of the fact that nothing was said about scaling practices, that the Commercial Scale practice, with which he was familiar, would continue to be used and be the basis of refunds. Indeed Mr. Long testified that he did not even know of the scale used by the Northern Pacific (Tr. 200).

While it is true that the refunds were made upon the basis of scales made by the carriers, there is nothing in the record from which it can be claimed that the shippers, including the appellee, believed or thought that any other than the Commercial Scale would be used.

Indeed, Mr. Irving, who was an active member of the logging and railroad conference, out of which the aforesaid agreement emerged, testified that he never knew of the so-called Northern Pacific Scale until the hearing before the Department of Public Works:

He testified (Tr. 280):

> "I first heard of the Northern Pacific scaling method in this hearing. I have been logging forty years in the State of Washington. I have shipped over all the railroads in the state, except the O.W. I shipped over the predecessor of the Northern Pacific, the Seattle Lake-Shore & Eastern, and the Seattle International, also the Monte Cristo."

He further testified(Tr. 283):

> "I didn't have any trouble on the Milwaukee and Great Northern about scaling."

With reference to the Northern Pacific scaling practice, he testified (Tr. 283):

> "I assumed you (referring to the Northern Pacific) were using the proper scale."

Indeed, with reference to the Long-Woodworth agreement, Mr. Irving also testified (Tr. 279):

> "I attended the conference that led up to the Long-Woodworth agreement. I never authorized anyone to agree to a rate which would call for any other scale than the Commercial Scale. The Long-Woodworth agreement would have been unacceptable to me if any other scaling method than the Commercial Scale was to be used in connection with rates."

Mr. Jamison, President of appellee, testified that he began to get suspicous about the scale used by the Northern Pacific and employed Mr. Fishbeck, as joint scaler on the Northern Pacific to scale and determine what was wrong in the excessive scales that he began to notice (Tr. 277).

It is true that freight bills (not showing scaling method despite appellant's inference to the contrary, App. Br. 155) were paid without complaint, not only because the shipper had to pay them first and then complain afterwards (Tr. 161), but also because the officials of the appellee did not know of the Northern Pacific's practice (See Br. 6, 88).

> (Compare appellant's brief 5, 6, 7, 25, 26 and 27.)

4. Appellant states that it used the same form of tariffs since 1906 (App. Br. 20).

The following additional facts should be noted with reference to that statement.

(1) Preceding tariffs were, except for tariffs 29 (which was immediately suspended) and 51, single and not joint tariffs (Tr. 202,3). In view of the fact that the scaling practices of other railroads, parties to the joint tariffs, differed from that of the Northern Pacific, there was an obligation on the part of the Northern Pacific to set forth in the Joint Tariff filed the scaling practice it would insist upon.

(2) Tariff 29 (which was immediately suspended) and 51, unlike the previous tariffs, used the term "board measure" for the first time (Tr. 210, 274).

(3) In 1922 the Department of Public Works published a Tariff Circular (Tr. 272), prescribing rules and regulations concerning the construction and filing of tariffs by common carriers. Among other things the circular provided:

> "Freight and express tariffs in book or pamphlet form must contain in the order named:
>
> "(g) Such explanatory statements in clear and explicit terms regarding the rates and rules contained in the Tariff as may be necessary to remove all doubt as to their proper application.
>
> "(i) An explicit statement of the rates in cents or in dollars and cents per pound, per one hundred pounds, per barrel or other package, per ton

> or per car, or other unit, together with the names or destinations of the places from and to which they apply, all arranged in a simple and systematic manner. Minimum carload weights or other units must be specifically stated. Tariffs containing rates per ton must specify what constitutes a ton thereunder. A ton of 2,000 pounds must be specified as 'net ton' or 'ton of 2,000 pounds'. A ton of 2,240 pounds must be specified as 'gross ton' or 'long ton' or a 'ton of 2,240 pounds'. A ton measurement must be specified as 'ton of 40 cubic feet.' Complicated or ambiguous terms must be avoided."

This circular, therefore, placed the duty upon carriers filing Tariff 51 to set forth a uniform meaning of "board measure," in view of the latent ambiguity of the term and the meaning that that term had in the logging industry. It is therefore hardly correct to state that Tariff 51 was identical with all preceding tariffs without considering the other facts above mentioned.

(Compare App. Br. 5).

The trial court and jury had a right to believe that the proper scale to be used by the Northern Pacific in assessing log freight, was the Commercial Scale, in view of the foregoing summaries of fact.

At the outset we believe it to be important, as well as helpful, to obtain what is a bird's eye picture of this case through the eyes of the Supreme Court of

the State of Washington in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691. The opinion of that court is as follows:

Main, J.—This is an appeal from a judgment of the superior court setting aside an order of the department of public works.

The facts essential to be stated are these: The Sauk River Lumber Company is a corporation, engaged in the the logging business, and will be referred to herein as the logging company. The Puget Sound Scaling and Grading Bureau is engaged in the business of scaling logs for its members and others, and will be referred to as the scaling bureau. During the year 1926, the logging company was logging near the town of Darrington in Snohomish county. One of the Northern Pacific Railway Company's lines extends from Darrington to the city of Everett. After the logs were cut, they were placed upon cars furnished by the railroad company, and transported to Everett. When they reached the yard in Everett, they were scaled by the railroad company's scalers, after which they were dumped into the boom, where they were scaled by the scaling bureau.

The shipment of the logs moved under what is referred to as tariff No. 51, which was filed with the

department of public works by the Chicago, Milwaukee & St. Paul Railway Company, the Great Northern Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Northern Pacific Railway Company, and which became effective October 1, 1925. This tariff provides for "rates in cents per thousand feet," and the rate therein stated from Darrington to Everett is $2.50 per thousand feet. There is a provision in the tariff that the minimum load is "six thousand feet board measure for each car used". The tariff in no place defines what is meant by "board measure".

During the year 1926, the logging company shipped logs, for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the department of public works for a refund. Upon the hearing, the department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63.

The difference arises by reason of the different methods of scaling. The scaling bureau used what is called the Scribner Decimal C Rule, with proper deductions. The railroad company's scalers used Scribner's Decimal C Rule, with deductions in accordance

with rules and regulations adopted by that company many years ago. The rules and regulations of the railroad company never became a part of tariff No. 51, and were not communicated to the logging company. The scaling bureau scaled from eighty to eighty-five per cent of the logs sold in Puget Sound waters during the year 1926, or approximately 1,800,000,000 feet. The scaling bureau's method is the one by which logs are bought and sold generally in the Puget Sound territory. The difference between the two methods of scaling is in the deductions, the railroad company's method allowing less deductions than that of the scaling bureau.

The tariff under which the logs moved not defining board measure, when the matter was presented it became primarily a question for the department of public works to determine. If the tariff, as filed, is doubtful or ambiguous, any doubt should be resolved against the party causing such tariff to be put into effect. In *North Packing & Provision Co. v. Director General,* 104 I. C. C. 607, it is said:

> "The failure of defendants to publish their rates and charges in clear and unmistakable terms, as required by the tariff rules, may not be used as a cloak to defeat the claims of shippers. In construing doubtful and ambiguous tariffs, the Commission has always resolved the doubt

> against the party responsible for having such tariffs in effect."

In interpreting a tariff, the terms used, when they are not defined therein, should be taken in the sense in which they are generally understood and accepted commercially. In *Armstrong Manufacturing Co. v. Aberdeen and Rockfish Railroad Co.*, 96 I. C. C. 595, it is said:

> "While doubts as to the meaning of a tariff must be resolved in favor of the shipper and against the carrier which compiled it, the doubt must be a reasonable one. In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers can be permitted to urge for their own purposes a strained and unnatural construction."

Since tariff No. 51 does not define what is meant by board measure, and since the method of scaling adopted by the scaling bureau is the one recognized commercially, it cannot be said that the department acted arbitrarily or capriciously in the construction which it placed upon the tariff. It is said that this construction will result in discrimination, but we think just the opposite is the effect. The department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs. If it had adopted the railroad's method of scaling, that likewise

would have become effective as to all shipments moving in this state. Inferentially, it appears that the other railroad companies which were parties to the tariff have carried logs for charges which were based upon the scale of the scaling bureau.

It is further said that the scaling bureaus method does not permit recovery for the entire mercantile content of the logs. No method of scaling can be mathematically correct and determine by the scale the exact amount of lumber that may be cut from a log. The fact that sellers and purchasers are willing to adopt the scale of the scaling bureau is a recognition that that scale is as nearly correct as can be made. Of course, it would be impractical to base a freight rate, and collect therefor, upon the basis of the actual cut at the mill from the logs.

It is also said that the scale of the bureau does not include logs broken in dumping ,or logs which have been stolen, but there is no evidence in this case from which it can be found that any substantial quantity of the logs were broken in dumping, or that any of them had been stolen.

Upon the trial before the department, the railroad company sought to introduce evidence which would tend to show that the amount of lumber cut from logs

would be greater than the scaling bureau's scale would indicate, and also that the method adopted by the bureau had a direct bearing upon the revenue of the railroad company, but this was rejected. It must be remembered that this is a proceeding to recover for an overcharge, and not a rate making proceeding. So far as this case is concerned, it must be determined by tariff No. 51, and the proper construction to put on what is meant by "board measure," because that is the basis upon which the freight charge must be made. In this proceeding, the department did not err in rejecting the evidence offered, of which ruling complaint is made.

This case is entirely different from that of *State ex rel. Washington Mill Co. v. Great Northern R. Co.*, 43 Wash. 658, 86 Pac. 1056, 117 Am. St. 1084, 6 L. R. A. (N. S.) 908, where an act of the legislature arbitrarily fixed the weight of standards for lumber cars at one thousand pounds and required such weight to be deducted from the net weight of the lumber on all carloads received for shipment, regardless of the actual weight of such standards.

The briefs in this case have taken a somewhat wider range that this opinion would seem to indicate, but we have considered and determined what appears

to us to be the controlling question, that is, whether the department adopted a wrong method for determining the amount of board feet in logs shipped. It would serve no useful purpose to give consideration to questions which are not necessarily here involved.

As to the amount of recovery, this is based upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate.

The judgment appealed from will be reversed and the cause remanded, with direction to the superior court to enter a judgment sustaining the order of the department of public works.

Tolman, C. J., Mitchell, Beals, Millard, and Beeler, J. J. concur.

Holcomb and Parker, J. J. dissent.

In rendering the foregoing opinion the court was acting in a judicial capacity to determine the reasonableness and lawfulness of the Findings and Order of the Department (Br. 60-68). It stated the law of the State of Washington by means of which to test the Findings and Order. This was not to make the decision res judicata of the issues involved (*C. M. St. P. & P. R. Co. v. Campbell River Mills* 53 F (2) 69) nor to make the decision the "law of the case" in the technical sense (*Steinman v. Clinchfield Coal Corp.,*

93 S. E. (Va.) 684 distinguishing res judicata and law of the case). It did, however, state what the law of the State of Washington was as to how to construe ambiguous terms in a rate tariff on principles of stare decisis. (*People v. Cassiday,* 117 Pac. (Colo.) 357)—and that law was binding (as well as persuasive) on the federal courts (25 C. J. 832).

BRIEF OF ANSWERING ARGUMENT

While in the interests of adequate presentation, each assignment of error has been separately considered, for the convenience of all concerned the following is a summary of the arguments used under the various assignments of error in answer to the appellant's arguments. Appropriate citation to the pages in the brief where the matter is principally discussed is made. Page references have not been given in those instances where an assignment of error is discussed on the basis of an argument previously made in detail in connection with another assignment. Page references to the detailed discussion are nevertheless made.

ANSWER TO POINT 1. Pages

Appellants argument that the appellee is not entitled to recover under the undisputed evidence is argued under eight heads:

A. Tariff 51 is not ambiguous. We contend it is ambiguous:
   (1) Under the law of Washington; 78
   (2) Because the term Board Measure in tariff 51 is a trade term subject to interpretation. 78, 80

B. If tariff 51 is ambiguous, undisputed evidence shows commercial scale interpretation to be unreasonable in failing to give effect to all the terms of the tariff. We contend otherwise, because:
   (1) The law of Washington furnishes the only proper interpretation as that of the commercial sense of the term; 17, 60-68, 78, 175
   (2) The interpretation in the commercial sense is reasonable and gives effect to all terms of the tariff. 83

C. Undisputed evidence of practical construction by the parties of the Northern Pacific scale is conclusive. We contend otherwise, because:
   (1) The law of Washington conclusively determines that the term Board Measure means Board Measure in the commercial sense; 88
   (2) The evidence shows no such practical construction; 88
      (a) Nor a construction knowingly acquiesced in by shipper. 88, 89
   (3) The Northern Pacific construction of the term results in discrimination; 90, 98

(4) The alleged practical construction is not conclusive. It is only one aid to construction, if applicable. 90

D. The commercial interpretation makes tariff 51 illegal in that it permits confiscation, discrimination, and free carriage. We contend otherwise, because:

(1) The law of Washington conclusively determines the method of ascertaining the meaning of board measure, and makes appellant's objection unavailable in this proceeding; 91, 92

(2) The sufficiency of rates is irrelevant in this reparation proceeding: 91, 92

(a) Carrier takes the risk of interpretation on a voluntarily filed tariff. 93

(3) Such evidence is inadmissible unless coupled with an offer to show the same is true as to other party carriers to tariff 51; 91, 99

(4) The evidence does not show discrimination; 97

(5) It is conclusively presumed that there is no free carriage in fact. 87, 95

E. The shipper has waived or is estopped to obtain reparation. We contend otherwise as to both estoppels argued, because:

(1) Estoppel based on failure to call the carrier's attention to the fact that it was using the wrong scale:

(a) This estoppel isn't pleaded; 100, 101
(b) There is no evidence to support it; 100, 101
(c) No estoppel is available because parties dealt at arm's length. 100, 102

(2) Estoppel under Long-Woodworth agreement:
(a) There is no proof that the agreement provided for the Northern Pacific scale; 114, 115
(b) The agreement being voidable, it cannot work an estoppel. 114, 117

F. Shipper cannot recover unless rates are unreasonable to shipper's damage. We contend otherwise, because:
(1) Washington statutes do not require proof of damage other than overcharge; 104, 107
(2) Appellant's authorities are not in point. 104, 107, 109

G 1. Unpublished scaling rules are binding and controlling. We contend otherwise, because:
(1) This principle is inoperative since the method for ascertaining the meaning of tariff 51 has been conclusively settled; 110, 175
(2) An unpublished scaling rule is void; 110
(3) There is no evidence that other carrier parties to tariff 51 used

the Northern Pacific unpublished scaling rule; 110, 113

(4) An unpublished scaling rule contrary to filed tariff 51 is void. 110, 114

G 2. Unpublished scaling rules are binding under the administrative construction of the statute. We contend otherwise, because:

(1) The method for ascertaining the meaning of tariff 51 has been conclusively determined; 110, 175

(2) An unpublished scaling rule is void; 110

(3) Administrative construction of the statute as applied by one carrier party to tariff 51 is insufficient; 110, 113

(4) An unpublished rule contrary to filed tariff 51 is void; 110, 114

(5) There is no evidence or sufficient offer of evidence showing such construction; 8, 88

(6) Such construction is ineffective in face of the Washington statute to the contrary. 111, 127

ANSWER TO POINT 2.

Appellant contends findings and order are inadmissible in whole or in part. We contend otherwise, because:

A. The form and sufficiency of the findings and order is no longer open to collateral attack in this case. 60

B. Items to which objection are made are not improper. 60, 68, 124

C. in any event, the remedy is in the courts instructions, and such instructions were sufficient. 60, 73

ANSWER TO POINT 3.

Appellant contends evidence as to other carriers' scaling practices was inadmissible. We contend otherwise, because:

A. Such evidence was proper to rebut Mr. Long's testimony offered by the carrier: 144, 161

(1) It was not remote; 148

(2) The form of competing carriers' tariffs was immaterial; 146

B. Appellant failed to remove prejudice, though accorded full opportunity. 147

ANSWER TO POINT 4.

Instructions.

A. Effect of findings:

(1) The court's instructions thereon were proper; 60

(2) The court's instructions on prima facie evidence were proper. 162-175

B. Effect of proceedings in state courts:

(1) The court gave proper effect to proceedings in the state courts, particularly with respect to the Supreme Court's decision. 17, 60-68, 78

(a) The action of the Supreme Court was properly in evidence for the jury's consideration. 153-157

(b) Instructions on the subject were adequate. 184, 185

C. Rules for the interpretation of tariff 51:

(1) The only proper instruction was that in accordance with the law of Washington construing an ambiguous term in its commercial sense. 187-191

D. Miscelllaneous:

(1) Court's instructions contradictory. 176

We contend otherwise;

(2) Instruction on free carriage improper. We contend that it was proper. 179, 180

(3) Instructions on protest and rule of tolerance improper. We contend they were proper:

(a) Because there is no evidence to warrant appellant's proposed instructions; 195

(b) The instructions given were more favorable to appellant than it was entitled to receive. 195, 197

ANSWER TO POINT 5.

Appellant contends striking all pleading and evidence as to estoppel and counter-claim was improper. We contend:

A. The court properly struck the counter-claim, because there was no evidence:

(1) Warranting rescission of Long-Woodworth agreement; 133

(2) Warranting a finding of breach

of the Long-Woodworth agreement; 133, 134

(3) The imposition of equitable conditions was not possible, since there were no grounds for equitable jurisdiction. 133, 135

B. Estoppel. We contend this issue was properly removed, because:

(1) No estoppel was possible in fact or in law; 114

(2) The objection is unavailable, since no exception was saved to the withdrawal from the jury's consideration of paragraph 12 of appellant's answer pleading estoppel. 201

ANSWER TO POINT 6.

Appellant contends the court erred in not giving effect to the principle that free carriage is illegal. We contend:

A. It is conclusively presumed that there is no free carriage in fact. The point is therefore irrelevant. 91, 95, 179

ANSWER TO POINT 7.

Appellant contends that plaintiff's witnesses should not have been permitted to give his conclusion as to evidence before the Department of Public Works. We contend:

A. That the testimony did not constitute an inadmissible conclusion. 150

B. There was no prejudice. 152

ANSWER TO POINT 8.

Appellant contends the court erred in refusing to dismiss plaintiff's case because the Department's order is not final. We contend:

A. The motion to dismiss does not raise this contention. 28

B. The order is final because the Department found the amount of overcharge and directed its payment. 28, 29

C. The findings support the order. 29, 37

ANSWER TO POINT 9.

Appellant contends the order is void because entered by the Department pecuniarily interested. We contend it is valid, because:

A. The claimed invalidating statute is inapplicable; 38, 39

B. The Department's pecuniary interest is indirect and remote and therefore permissible; 38, 41

C. The invalidating interest claimed to exist is ineffectual to render the order void because judicial review and a subsequent de novo trial is permitted. 38, 47

ANSWER TO POINT 10.

Appellant contends shipper cannot recover because there is a necessary party absent, and a splitting of a cause of action. We contend neither point is valid, because:

A. The objection was not timely urged, and therefore waived; 49

B. The shipper may sue as the real party in interest so that the Department is not a necessary party; 49, 51
C. No splitting of a cause of action is involved. 49, 58

ANSWER TO ASSIGNMENT AND SPECIFICATION OF ERROR No. 1

(Tr. 64, 73, 288, 387; App. Br. 352-372)

Appellant contends the court erred in denying defendant's motion to dismiss for want of jurisdiction based upon the fact that the order of the Department of Public Works on which this suit is brought is not a final order.

It argues, (1) That a final order must be entered by the Department of Public Works before suit can be brought in the Superior Court to enforce it. (App. Br. 359, 361, 367); (2) That the order entered here is not final because: (a) The amount of overcharge has not been *found* (App. Br. 362, 364) or directed to be paid in a specific sum (App. Br. 368), the Department reserving jurisdiction to find the amount if the parties could not agree; (b) The amount found (if the findings and order are construed to constitute a finding and order as to amount) is unsupported by the findings of fact and therefore ineffective (App. Br. 367).

No case cited by appellant in support of this assignment of error is in point.

It is appellee's position that:

(1) The motion for dismissal, which is the subject of this assignment of error, does not raise the question argued.

(2) The Department *found* the amount of overcharge and directed appellant to pay it, so that the order is "final."

(3) That the findings support the order. Hence the order is a final order enabling the shipper to bring suit thereon.

We shall discuss these points in the order named.

(1) The motion for dismissal is based expressly on want of jurisdiction, but the fact that the court had jurisdiction of the parties and the subject matter, i. e. recovery of the overcharge, seems clear. The railroad appeared generally, not specially. (Tr. 22). The question that it raised could only be raised by demurrer (R. R. S. 259), in accordance with state practice in a law case. (28 U. S. C. A. 724). This motion confuses jurisdiction with the sufficiency of facts alleged to constitute a cause of action.

An oral demurrer was later interposed by defendant but upon different grounds (Tr. 74) and the action of

the trial court in overruling that demurrer will be considered later.

(2) Assuming, however, that the motion to dismiss be treated as a demurrer, it is still not well taken. An examination of the findings and order makes it clear that the amount of reparation was found by the Department. Paragraphs (9) and (10) of the findings (Tr. 79 to 81) discuss the methods used by appellee in arriving at the overcharge of $9,282.63. It represents the difference between freight charges paid, a total of $188,784.55, and the freight charges that should have been paid, based on the Commercial Scale, of $179,501.92. That the method used by the shipper in determining the amount of overcharge was accepted by the Department, is indicated by referring to paragraphs (23) to (25) (Tr. 92), which read as follows:

> "(23) We are further of the opinion and find that all shipments of logs herein referred to, made by the complainant between the dates shown, were properly and correctly scaled by the bureau in accordance with the methods described above.
>
> "(24) We are further of the opinion and find that the charges collected were unreasonable to the extent that they exceeded $179,501.92.
>
> "(25) We further find that complainant made the shipments as described at the charges herein found unreasonable, that it paid and bore the

> charges thereon, that it has been damaged thereby in the amount of the differences between the charges paid and those which would have accrued at the charges herein found reasonable; and that it is entitled to reparation and interest."

In making this finding the Department necessarily accepts the shippers method of giving credit to the railway for rates based upon a minimum load of 6000 feet board measure for each car, the computations as to the minimum being clearly set forth in paragraphs (9) and (10). Furthermore, the amount of the freight charges paid were as stated in the findings, (Par. (10), Tr. 80) "computed from the paid freight bills of the railway company offered as Exhibit No. 3 in this proceeding." Exhibit No. 3 is the same as plaintiff's Exhibit 14, 15 and 16, introduced in the trial below. (Tr. 279).

The foregoing facts should dispose of the statements made in appellant's brief (p. 363) as to uncertainty in respect to the amount found by the Department as an overcharge.

Furthermore, the order recites: (Tr. 92)

> "This cause being at issue upon complaint and answer on file and having been duly heard and submitted by the parties and full investigation of the matter and things involved having been had and the Department having on the date hereof made and filed a report containing its *findings of*

fact and conclusions thereof which said report is hereby referred to and made a part hereof.''

Having found that the frieght charges paid were $188,784.55, and made that finding a part of the order, the Department then proceeds to order the Northern Pacific to pay as reparation "all sums in excess of $179,501.92"; it is clearly a mere matter of mathematics to determine that the difference between the amounts $188,784.55 and $179,501.92 is the amount of reparation in the sum of $9,282.63.

The foregoing review of what the Department found is clearly sustained by the view taken by the Supreme Court of Washington on appeal (160 Wash. 691) of that same order. In affirming the Departmental award the Supreme Court describes the proceeding as an appeal to it from the Superior Court's judgment "setting aside an order of the Department of Public Works for reparation of overcharges by a public carrier."

In referring to what the Department found the court said: (P. 693)

> "Upon the hearing, the Department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63."

At page 696 of its opinion the court said:

> "As to the amount of recovery, this is based

> upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate."

The court then directed the Superior Court to enter an order sustaining the order of the Department.

In reviewing the order, the Supreme Court acted in a judicial capacity, as will be hereinafter pointed out. In interpreting the order, therefore, the court's interpretation would seem to be conclusive and certainly highly persuasive. See *Arizona Wholesale Grocery Co. v. Southern Pac. Co.*, 68 F. (2) 601 (C. C. A. 9th).

The only matter which throws any doubt upon the conclusion that the order entered was a final order finding the amount of the overcharge, is the paragraph reserving jurisdiction to enter a further order and directing the parties meanwhile to ascertain the amount of reparation due. But for this paragraph there could be no question whatsoever about the soundness of the conclusion above reached. The aforesaid paragraph, if read literally would nullify the first paragraph; would discard and throw overboard all the facts and figures found after weeks of testimony, and leave the parties just where they were before this protracted hearing. Can it be claimed that because of the conflict between the two paragraphs that

the order is ambiguous? Is the order one for the payment of $9,282.63, or is it as appellant contends, no such order at all?

There can be no better guide as to the meaning of the order, than the construction placed upon it by the parties affected thereby. The railroad itself has at all times treated the order as one ordering the payment of reparation in the sum of $9,282.63. Thus, when the plaintiff brought suit to recover the amount of the award, and the defendant petitioned to remove the proceedings to the Federal Court, its petition for removal alleged: (Tr. 9)

> "That this suit is one of a civil nature in equity, of which the District Courts of the United States have original jurisdiction, in that this action is to recover on an interlocutory order made by the Department of Public Works on July 1, 1929, that petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharges. . . . "

Furthermore, in opposing the shipper's motion to remand, the carrier contended that the affirmance of the Departmental award authorized the shipper to commence suit, which was but another way of stating that the award was final so that suit might be commenced. Judge Neterer apparently accepted this contention, because in his memorandum decision denying the motion to remand he stated: (Tr. 16)

> "The motion to remand must be denied. The joint jurisdiction of the Department of Public Works and its findings and order and review by the nisi prius court and the Supreme Court of the state, together a regulatory body is exhausted. The function of the regulatory body was to find the facts upon the evidence presented. This finding the defendant may accept and pay within a given time. Upon failure to pay, a right is given plaintiff by the law to sue defendant for such sum. This is the creation of a new right, an independent cause of action to collect the claim by plenary action and in a tribunal of competent jurisdiction. The plaintiff could elect to sue in the state court and the defendant had the right to remove the action to this forum."

This was clearly recognition of the fact that the order was so far final as to permit a plenary action in a court of competent jurisdiction to recover the amount of the award. The departmental jurisdiction had been exhausted.

Further more, any ambiguity that may have existed as a result of paragraph two of the order, reserving further jurisdiction, must, in view of the decision of the Supreme Court of Washington be deemed to be resolved against the carrier. It stated what the order meant, and that meaning, we submit, is not only highly persuasive, but binding.

At this point we call attention to *State ex rel G. N. Ry. Co. v. Public Service Commission,* 76 Wash. 625.

This case holds that an order is final even though it contains a provision that in case of the failure of railroads to agree upon joint rates the public service Commission would itself by supplemental order establish such rates and fix the division between the respective carriers. The court said:

> "It fully covered and disposed of the matter before the Commission. It required nothing to make it effectual, and, had it been complied with by appellants, would have ended the matter. That it did not end the matter was not because of its lack of finality, but because, appellants, having failed to observe its mandate, subsequent action to enforce it became necessary on the part of the Commission."

The shipper's claim originated in January 1927. The litigation was in the Department for two years; was in the state court for two years more, and at the time of the trial was in the Federal court for four years, a total of over seven and one-half years of litigation. During this entire period the carrier, as well as the shipper, the Supreme Court of Washington, and the trial court in this case, have all treated the order of the Commission as an adjudication of the amount of the overcharge. The defendant is sarcely in a position to ask the court, in good faith, contrary to all its former contentions on this point, to absolutely dismiss this case. The order of the Department,

viewed in any common sense way from any practical angle, is a determination that the overcharge has been made and the amount thereof found.

This court is asked by the carrier to take a strictly literal and technical view of the language of the order and of the problem involved. Its plea to the court now is: "Please do not hold us accountable for what we have overcharged our customers because the Departmental language is somewhat obscure and ambiguous."

The real point at issue has been decided by the Department. To contend now that no order of reparation has been entered, although that order has been recognized during years of litigation, aud although the defendant itself has treated the order as sufficient up to the time of trial, is an unmeritorious argument to the effect that form should govern at the expense of substance and that the whole proceeding should be commenced over again and run through another period of years.

Not a single case cited by the appellant warrants any such holding in this case. Even in the *Campbell River Mills Company* case, so confidently relied upon by appellant (App. Br. 368, 369) the form of the order is not set forth, so that it cannot be determined whether the order entered was a final one or not.

Unquestionably it was not final because the freight or express bills were not filed or produced at the hearing (53 Fed. 2d. 70). In the case at bar the freight bills were introduced at the hearing so that the Department was in a position to determine the amount of freight charges paid, and hence, to enter an order of reparation based upon the difference between the freight charges paid and the freight charges payable. The *Campbell River Mills Company* case is, therefore, clearly not in point.

(3) Appellant also claims that the findings do not support the order, thereby rendering the order ineffective (App. Br. 367). But the Supreme Court of Washington, charged with the responsibility of determining the "reasonableness and lawfulness" of Findings and Order (Br. p. 61) upheld them, ordering (p. 696):

> "The judgment appealed from will be reversed and the cause remanded, with direction to the Superior Court to enter a judgment sustaining the order of the Department of Public Works."

Had the findings been insufficient to sustain that order the court would have been compelled, under the authorities cited by the appellant (App. Br. 365, 367), to have affirmed the action of the Superior Court in setting the order aside. See also *People's*

Fruit & Veg. S. Ass'n v. Ill. Com. Com'n, 184 N. E. (Ill.) 615. It is now too late to attack the validity of the order collaterally in the fashion here attempted Any such attempt must be based upon a view that the decision of the Supreme Court of the State of Washington has absolutely no meaning or effect whatsoever.

It is respectfully submitted, therefore, that appellant's assignment of error No. 1 is not well taken.

ANSWER TO NO. 2

(Tr. 73, 288, 387; App. Br. 373-392)

Appellant contends, court erred in denying its motion to dismiss for want of jurisdiction, on the ground that the order of reparation is void under the Fourteenth Amendment to the Federal Constitution in that the Department of Public Works had a pecuniary interest in the award entered.

We contend: (1) the invalidating statute is not applicable;

(2) the Department's interest is indirect and remote;

(3) a *de novo* trial and judicial review being permitted, the contention falls.

(1) The ten per cent statute relied on is not applicable here.

The award was based upon the procedure provided in the laws of 1911, p. 600, Sec. 91 (R.R.S. 10,433) calling for a hearing before the Public Service Commission. The duties of that commission were subsequently taken over by the Department of Public Works under the supervision of the Director of Public Works (Laws 1921, p. 18, Sec. 21; p. 19, Sec. 25; R. R. S. 10779, 10784).

The Department originally consisted of a Supervisor of Transportation, a Supervisor of Public Utilities and a Supervisor of Highways (Laws 1921, p. 18, Sec. 21, R.R.S. 10779). The office of Supervisor of Highways was afterwards abolished (Laws 1923, p. 192, Sec. 3, R.R.S. 10939-3), so that at the date of the hearing of this cause before the Department of Public Works there were the Supervisor of Transportation, the Supervisor of Public Utilities and the Director of the Department. These heard the complaint (Tr. 75). There is no provision in the Laws of 1911 for any fee to which the Public Service Commission shall become entitled.

The provision as to the ten per cent fee applies only to a proceeding under the act passed in 1921

(Laws 1921, p. 336, R.R.S. 10435) and provides a supplementary method of collecting refunds, since the director in his discretion is authorized to render judgment for the amount of overcharge found. For refunds collected by the Department "under this act" a ten per cent fee may be charged for that purpose (Laws 1921, pp. 336, 337, Secs. 2 and 3, R.R.S. 10435, 10436). The ten per cent is collected only if the refunds are collected; not merely if the award is made. Obviously, if the claimant itself collects the award by resorting to suit, as provided in the procedure of the Laws of 1911, p. 600, Sec. 91, R.R.S. 10433, the ten per cent provision is not applicable.

While it is true that the Departmental order in this case directs payment by the Northern Pacific to the Department of Public Works under the 1921 Act, payment to the beneficial plaintiff, namely The Sauk River Lumber Company, would be a defense to a subsequent claim by the Department, and because the Department had not collected the refund would not involve the application of the ten per cent provision (Br. p. 38).

Our first point is, therefore, that the appellant's argument must fail because it is based on a provision of an inapplicable statute.

(2) Assuming that the ten per cent statute (R.R.S. 10436) is held to apply, there is nevertheless no denial of due process. It will be noted that the ten per cent fee is to be paid into the Public Service Revolving Fund of the State Treasury by the terms of the statute itself. This fund is a General Fund, available for all general fund purposes (R.R.S. 5509). Neither the salary of the director nor the administrative expenses of the Department of Public Works is dependent upon the outcome of a reparation case. That salary and those administrative expenses are paid, irrespective of the outcome, and is provided for by other general statutes of the state (R.R.S. 10776, 10896). Such salaries and such administrative expenses come from the General Fund, irrespective of the origin of the money paid into such fund (R.R.S. 5510).

While it is true, as appellant has pointed out (App. Br. 386), that the legislature has appropriated to the Department of Public Works certain sums from the Public Service Revolving Fund, it should also be pointed out that the same appropriation statutes on the same pages cited also made substantial appropriations from other General Funds to that Department. It is reasonable to assume, in view of the fact that the General Fund appropriations have

been in varying amounts, that any administrative needs of the Department of Public Works would be met by sufficient appropriations from other General Funds, so that the Department could have no direct interest in the outcome of any reparation case.

Furthermore, it is to be remembered that there is nothing in the statutes of the State of Washington that compels the legislature to appropriate the funds from the Public Service Revolving Fund to the Department. It can be used like any other General Fund in the payment of any state obligation. Any interest that the Department would have in ordering reparation would therefore be indirect and remote.

In view of the foregoing statement of the indirect and remote interest of the Department in the outcome of a reparation case, it can readily be seen that the cases cited by appellant are clearly distinguishable and not in point.

In the case of *Tumey v. Ohio,* 273 U. S. 510, 71 L. Ed. 749, 47 Sup. Ct. Rep. 437 (App. Br. 376), it appeared that the compensation of the Mayor was directly dependent upon the fees received from convictions, quite unlike the case at bar. Likewise the statute under which convictions were had was such that a fair trial was wholly improbable. It was

on this phase of the matter that the court refers to the official as distinguished from the private interest of the Mayor in securing convictions. The court described this situation as follows (p. 444):

> "The statutes were drawn to stimulate small municipalities, in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial, and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence, unless it should appear to be so manifestly against the evidence as to indicate mistake, bias, or willful disregard of duty by the trial court. It specifically authorizes the village to employ detectives, deputy marshals, and other assistants to detect crime of this kind all over the county, and to bring offenders before the mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful

> conduct of such a court. The mayor represents the village and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all; and, second, having found his guilt, to measure his punishment between $100 as a minimum and $1000 as a maximum for first offenses, and $300 as a minimum and $2000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?''

Likewise the case of *In Re Volland,* 69 Fed. 2d. 475 (App. Br. 381), was one in which the special master before whom the case was tried had a direct pecuniary interest in deciding the case for one of the litigant parties, namely, the trustee in bankruptcy. By deciding the case in his favor the assets of the bankruptcy estate would be increased and the fees payable to the referee in bankruptcy would be enhanced. Since the special master was the referee in bankruptcy also, it is obvious that his direct pecuniary interest in the outcome of the case would disqualify him.

Again the District Court case of *Texas Electric Service Co. v. City of Seymour,* 54 Fed. 2d. 97 (App. Br. 384), was one in which the City Council was held

disqualified from raising the rates of a private utility to a point of parity with that of its competing municipal utility. The interest of the City Council in thus fixing the rate of a competitor in a town of 2626 people is so obvious that a fair rate making proceeding was wholly improbable.

That the distinctions hereinabove made are supported in the cases will appear from cases subsequent to and explaining the Tumey case.

In *Dugan v. State of Ohio,* 277 U. S. 61, 48 Sup. Ct. 439, the court held that a defendant convicted before the Mayor's court was not denied due process because half of the fines were paid into the City Treasury and the Mayor as a member of the City Commission had a right to vote on appropriations and the spending of city funds, even though the fines contributed to the general fund out of which the Mayor's salary was payable. *The Mayor received a salary and no fees and his salary was not dependent on whether he convicted in any case or not.*

The court said (p. 440):

> "No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general

> fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or effect his fixed compensation. The mayor has himself as such no executive, but only judicial, duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the Tumey case do not cover this."

In *Bevan v. Krieger,* 289 U. S. 459, 53 Sup. Ct. 661, the court held that the notary's right to fees for taking depositions and for taking testimony stenographically and furnishing additional copies thereof, is not such pecuniary interest as rendered his commitment of witnesses for contempt for refusal to answer questions violative of due process. In distinguishing the Tumey case the court said:

> "Tumey's interest was direct and obvious, but the possibility that the extent of the Notary's services and the amount of his compensation may be affected by his ruling is too remote and incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the Tumey case, as it is subject to review in accordance with Sec. 11514."

In re Battani, 6 Fed. Supp. 376, held in a proceeding to compel the depositary to surrender bankruptcy funds, the referee was not disqualified because of

alleged increase in fees based on increase in amount payable from depositary. The court distinguished the Tumey case in that "a direct financial benefit would have resulted to the official from his act."

The court also said (p. 378):

> "Such a reason for disqualification would to a large extent prevent referee's functioning in office. In every proceeding involving accumulations to an estate they would be disqualified."

(3) There is still a second ground of distinction between cases such as the Tumey case and cases such as that here involved. Not only is the pecuniary interest indirect and remote in this case, but the findings and award entered are subject to judicial review and then are merely prima facie evidence of the facts found and not of liability. The carrier tries his case *de novo,* when an action is brought in a court of competent jurisdiciton to recover because of the award made. Where a *de novo* trial is permitted defendant, he cannot claim an award, even by an administrative body that has an interest therein, is a denial of due process.

See *Bevan v. Krieger,* 289 U. S. 459, *supra,* in which the court said:

> "Moreover, his action lacks the finality which attached to the judgment in the Tumey case,

as it is subject to review in accordance with Sec. 11514."

See also, *Hill v. State,* 298 S. W. (Ark.) 321, distinguishing the Tumey case from the Hill case in that a *de novo trial* was provided, and *Brooks v. Town of Potomac,* 141 S. E. (Va.) 249, assigning a similar reason, despite the fact that the Mayor, by imposing a fine, received $3.00 and by giving judgment of acquittal only received a fee of $1.50.

Finally it should be pointed out that the Supreme Court of Washington in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, before whom the point now urged by appellant was argued, apparently rejected it is not a controlling point. Had the point been meritorious, the Supreme Court would have been compelled to set aside the Departmental award. See Resp. Brief, Pl. Exh. 19, 20 (Tr. 286).

It is therefore submitted that appellant's assignmentment of error No. 2 is unavailing.

ANSWER TO NO. 3.

(Tr. 74, 289, 388; App. Br. 392.)

The trial court denied appellant's motion for dismissal, overruled its oral demurrer and refused to stay proceedings, which motions and demurrer were

on the ground that there had been a splitting of a single cause of action and the absence of an indispensable party plaintiff.

Appellee's position is:

1. The objection on which error is assigned was not timely made.

2. The order requiring payment of the reparation to the Department of Public Works not having been followed by the entry of judgment, permits the shipper as a real party in interest, to bring suit in a court of competent jurisdiction to recover the amount of reparation awarded. Hence Department isn't necessary party.

3. The recovery by the shipper includes the ten per cent as part of one cause of action if such ten per cent is payable. There is therefore no splitting of a cause of action.

We shall discuss each of the above points in the order named.

1. The point that the Department of Public Works was a necessary party and that a cause of action would be split if the shipper alone were permitted to sue, was raised for the first time on the morning of the trial (Tr. 74). Despite the fact that the

order was set out in full in the complaint so that the objection of absence of necessary party was apparent, the appellant neither demurred for want of a necessary party as permitted by the Washington statute (R. R. S. 259) nor set up this defense in its answer (Tr. 22, 54). It is well settled that the point thus raised by appellant came too late.

Dryden v. Sewell, 2 Alaska, 182.
Flanagan v. Drainage Dist. No. 17, 2 S. W. (2d) (Ark.) 70.
Sifers v. Walch, 195 N. W. (Iowa) 185.
Bignold v. Carr, 24 Wash. 413, 64 Pac. 519.
Baxter v. Scoland, 2 Wash. Terr. 86, 3 Pac. 638.

R. R. S. Sec. 263 provides:

> "If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

The motion to dismiss, the demurrer and motion to stay were not based upon lack of jurisdiction or insufficient facts, but were based solely upon the ground of defect of parties plaintiff and the consequent splitting of a cause of action if plaintiff is permitted to recover. Under the statute the objections were made too late to be available. On the

question of sufficient facts to constitute a cause of action, see argument pp. 28, 51-58, *infra.*

As pointed out in the case of *Dryden v. Sewell,* supra, under the statute providing that every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the act, where the objection is not taken *in limine* by plea, answer or demurrer the court considering the mischief already incurred and the objection being merely technical and formal, will not, except in special cases allow it to prevail at the hearing, but will deem it to have been waived.

While the Washington cases above cited dealt with defects of parties defendant, the rule applies whether the parties be defendant or plaintiff, as indicated in the Flanigan case above cited, which involved a cross-complaint.

This being a law action, the Federal Court will by virtue of the provisions of the conformity act, adopt the state procedure on the above question.

2. Under the 1921 act the Director of the Department of Public Works was permitted but not required to render judgment for the amount of reparation awarded "if he deemed it necessary to insure the prompt payment of the same to him." (R. R. S. 10,

435). In the absence of a finding to that effect the reparation award would not be a judgment within the meaning of the statute.

> *Tacoma Grain Co. v. N. P. Ry. Co.,* 123 Wash. 664, 213 Pac. 22.

Furthermore, it is doubtful if the director could constitutionally enter judgment on his reparation award. In the Tacoma Grain case, supra, the court doubted his power to do so in the following words (p. 668):

> "We will not determine in this matter whether the department of public works, a fact-finding body having administrative powers, has power to enter a judgment which can be enforced under the provisions of the act of 1921, supra. Superficially, it might be suspected that the commission has no such power, notwithstanding the statute referred to; but we will determine that question when it arises in an appropriate manner."

The doubt thus expressed may be based upon two grounds. The first is, that the judicial power to render a judgment cannot be delegated to an administrative board in view of the theory of separation of powers. See 12 C. J. 902, 33 C. J. 1064. Secondly, a judgment entered upon findings and order awarding reparation would in effect render such findings and award conclusive, and not merely prima facie evidence of the facts stated. This would constitute a viola-

tion of the provisions of the state constitution granting trial by jury, and would undoubtedly be void. See

New York & Pennsylvania Co. v. New York Central R. Co., 110 Atl. 286 (Pa.).

Western New York, etc. v. Penn. Refining Co., 137 Fed. 343 (C. C. A. 3rd).

Meeker v. Lehigh Valley R. R. Co., 236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644.

State ex rel Chicago, Milwaukee & St. Paul Ry. Co. v. Public Service Com., 94 Wash. 274, 286.

If therefore the Department does not or cannot constitutionally enter a judgment upon a reparation award, would a complainant be without remedy to enforce an award merely because the director orders payment to the Department rather than to the complainant? Such a conclusion is by no means compelled by the statutes involved.

Laws 21, p. 337, Sec. 6 provides:

> "Hearings to determine the amount of any refund due under this act shall be held in the same manner, *the same procedure followed, . . .* as is provided for hearings, *procedure,* reviews and appeals in matters before the Public Service Commission of Washington under the provisions of Chapter 117 of the Laws of 1911."

Appellant's argument fails to give effect to the phase, "the same procedure followed" contained in the above act (App. Br. 398, 399). Since the entry

of judgment is not made mandatory by the 1921 Act, is it not reasonable to assume that the legislature did not intend to deprive a complainant of relief by way of suit in accordance with the procedure under the 1911 act if no judgment for overcharge was or could constitutionally be entered? It would require a highly technical interpretation of the meaning of the legislation to contend as does the appellant, to the contrary.

After all, the suit is not on the award as such. The suit is on a cause of action, one constituent fact of which is the entry of findings and order by the Department of Public Works. The fundamental fact is that findings and order have been entered awarding reparation and that the shipper entitled to reparation has been clearly named. Overcharges were exacted by the carrier in the year 1926. It was a condition precedent that the amount thereof be determined by the Department. *Belcher v. Tacoma & Eastern R. Co.,* 99 Wash. 34. That condition precedent has now been satisfied, and technical considerations should not be permitted to deprive the shipper of his right to recover for overcharges thus exacted.

The complainant who has been compelled to pay excessive freight charges is the real party in interest

and the party beneficially interested in the award. R. R. S. Sec. 179 provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as it otherwise provided by law."

The Federal Court, under the Conformity Act, in a law action is bound by this provision.

> *American Surety Company of New York v. Scott,* 63 Fed. (2d) 961 (C. C. A. 10th).
>
> *U. S. v. Skinner & Eddy Corp.,* 5 Fed. (2d) (D. C. Wash.) 708.
>
> *U. S. v. Skinner & Eddy Corp.,* 28 Fed. (2d) D. C. Wash.) 373.
>
> *U. S. v. Skinner & Eddy Corp.,* 35 Fed. (2d) 889 (C. C. A. 9th).

It has been generally held that persons injured by the payment of excessive freight charges are entitled to recover the reparation as the real party in interest, irrespective of the paper title to the reparation. Ann. 13 A. L. R., 289 collects the numerous authorities. It has even been held that the state cannot maintain an action to recover overcharges unlawfully exacted from shippers by common carriers because it is not the real party in interest, the shippers being such real party. See 13 A. L. R., p. 299.

While the Supreme Court of Washington has not specifically passed on this point, it was held that the

party beneficially interested is the real party in interest under the aforesaid statute despite the fact that legal title was in another.

Stotts v. Puget Sound Traction Light & Power Co., 94 Wash. 339, 162 Pac. 519, held that a vendee in possession under a conditional sales contract may maintain an action for injuries to the property as the real party in interest within the meaning of Rem. Code, 179, even if vendee does not have legal title, especially in view of the defendant's right to bring in additional parties.

If the appellant deemed the presence of the Department of Public Works necessary to a determination of this litigation it might under the provisions of R. R. S. 196 have brought the Department in as an additional party in the case. That statute provides:

> "The court may determine any controversy between parties before it when it can be done without prejudice to others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties the court, shall cause them to be brought in."

The Federal Court by virtue of the Conformity Act had the same power and might have granted that relief had it been timely invoked.

Simpkins Federal Practice, Rev. Ed. Sec. 25, p. 27. It seems clear therefore that in the absence of a judgment entered by the director, the shipper as real party in interest had a right to sue for the purpose of recovering the amount of the award.

The absence of the Department as a party plaintiff has not worked any injustice whatsoever to the appellant. The appellant has been permitted to assert every defense that it could have asserted had the Department been a party plaintiff. Since a recovery by the real party in interest is an effectual bar to a recovery by anyone else the appellant can scarcely claim prejudice by reason of the absence of the Department as a party plaintiff. 47 C. J. 34. See also *Blaser v. Fleck,* 189 Pac. (Ore.) 637, p. 638:

> "A question similar to the one in the present case was disposed of in *Sturgis v. Baker,* 43 Or. 236, as page 241, 72 Pac. 744. It was there held that the statute requiring that every action shall be prosecuted in the name of the real party in interest (section 27 L. O. L.) was enacted for the benefit of a party defendant, to protect him from being again harassed for the same cause. But if not cut off from any just offset or counterclaim against the demand, and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. See also *Simon v. Trummer,* 57 Or. 153, 159, 110 Pac. 786; *Triphonoff v. Sweeney,* 65 Or. 299, 307, 130 Pac. 979; and *Devlin v. Moore,* 64 Or. 433, 441, 130 Pac. 35."

In this case, the Department is bound by any judgment obtained by the shipper since it is in any event a privy to such judgment. Its rights are wholly derivative. Unless the shipper has a right to the reparation award and collects the same the Department has no interest therein. It being a privy to the judgment, the judgment recovered is binding against it and it cannot thereafter assert the claim recovered by the real party in interest. See 34 C. J. 1009, 1010 and 1011 discussing privies. This is but another way of saying that a recovery by the real party in interest is a bar to recovery on the same cause of action by anyone else. 47 C. J. 34.

3. The Department has of course no independent cause of action for the 10% collection fee. This conclusion follows from what has heretofore been urged, namely, first, because the statute is not applicable to collections effected by the shipper, and secondly, because the fee is included in the award. The cause of action is entire and since recovered by the real party in interest, no splitting of a cause of action is involved. If the 10% is owed it is owed by the shipper to the Department, and not by the carrier to the Department. An analogous case is that of *Harris v. Johnson,* 75 Wash. 291. There the payee of a promissory note was held to be the real party in interest

entitled to sue thereon under the state statute despite the fact that the promissory note was for a sum to be divided between herself and another person not a party to the suit. So in this case the complainant is the real party in interest. The fact (if it be a fact) that the proceeds must be divided with the Department of Public Works does not mean that there is a splitting of a cause of action to permit the real party in interest to recover the whole.

The rule should also be remembered that where sufficient parties are before the trial court to authorize a proper judgment, the fact that others are interested in the subject matter will not call for reversal if no injustice has been done.

Davison v. Rake, 16 Atl. (N. J.) 227; affirmed 18 Atl. (N. J.) 752.

It is submitted that appellant has not been prejudiced in any way whatsoever by the absence of the Department as a party in the case, and that, therefor, this assignment is not well taken.

ANSWER TO NOS. 4 TO 22, INCLUSIVE

(Tr. 75, 94, 102, 388, 407-423; App. Br. 247, 256-293).

Appellant contends that the trial court erred in overruling appellant's objection to introduction in evidence of the findings and order of the Department. (Pl. Ex. 1). The ground of the objection was, (1) that improper matter was inextricably interwoven with proper matter so that it was impossible to cull out the findings to support the order; and (2), alternatively, that the court should have deleted improper matter before admitting the findings.

It is appellant's position:

(1) That the form and sufficiency of the findings and order are no longer an open question in this case, and not subject to what amounts to collateral attack;

(2) The items to which objection are made are not improper;

(3) In any event, the remedy is in the Court's instructions to the jury.

We shall discuss each of these contentions in turn.

1. *Form and sufficiency of findings and order conclusive.*

It will be recalled that under the State Reparation

Statute the Department enters its findings and order and the statute permits review of the "reasonableness and lawfulness" of the findings and order to the Superior Court and then to the Supreme Court of the State of Washington. This is explained in *Willapa Power Co. v. Public Service Commission,* 110 Wash. 193, 195. In this respect the procedure differs vitally from that under the Interstate Commerce Commission statute. Under the procedure provided by that statute, the Interstate Commerce Commission enters findings and order in a reparation case with no provision for review to the District Court, then to the Circuit Court of Appeals and then to the Supreme Court of the United States. The first time that the findings and order of the Commission may be the subject of judicial scrutiny is when a suit is brought in the District Court to recover the reparation awarded. At that time for the first time is there any scrutiny of the validity or form of the findings and order. (49 U. S. C. A. 16 (1), (2).)

Under the state procedure the Superior Court and the Supreme Court of Washington act judicially in examining into the reasonableness and lawfulness of the findings and order of the Commission. Unlike the 1909 Act, which empowered the Supreme Court not only to set aside the findings and order of the

Commission for error but also to make new and corect findings to take the place of those set aside, the 1911 and 1921 Acts give no right to make substitute findings. The court merely determines if the findings and order are reasonable and lawful, and in connection with that determination, determines whether the findings are supported by the evidence and the order by the findings.

Laws of '11, Ch. 117, §§ 86, 89;

Great Northern Ry. Co. v. Department of Public Works, 161 Wash. 29.

Such a determination is judicial in character and not administrative or legislative.

Bacon v. Rutland R. Co., 232 U. S. 134, 34 S. Ct. 283;

Prendergast v. New York Telephone Co., 262 U. S. 43, 43 S. Ct. 466;

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527;

Nappa Valley Electric Co. v. Railroad Commission of Cal., 257 Fed. 197.

It is true that appellant contends that the action of the Supreme Court is legislative and not judicial in character, relying upon dicta in Judge Neterer's decision denying motion to remand. (App. Br. 16). But Judge Neterer, it is submitted, fell into error in so stating for he relied on the case of *Puget Sound*

Electric R. R. Co. v. Lee, 207 Fed. 860, involving the character of proceedings by the Public Service Commission and the Supreme Court of Washington under the Laws of 1909. As has already been pointed out, and as pointed out by Judge Neterer in his opinion, the 1909 statutes gave the court the power to set aside findings for error and to substitute new and correct findings. He too recognized that as pointed out in *Prentis v. Atlantic Coast Line Co.,* 29 S. Ct. 67, such power is legislative, not judicial. Judge Neterer therefore failed to consider the fact that the 1911 Act, by eliminating the power to make substitute findings, changed the character of the court's action from legislative to judicial.

The Supreme Court of Washington having decided judicially in *Northern Pacific R. Co. v. Sauk River Lumber Co.,* 160 Wash. 691, that the findings are sufficient and that the order is supported by the findings, the Federal Court is bound by such determination irrespective of the view it might take independently but for such determination.

See *Northern Pacific R. Co. v. Baker,* 3 Fed. Supp. 1. In that case a suit to enjoin the Department of Public Works from putting into effect a confiscatory rate order was brought before a three Judge court.

The appeal procedure in the state courts had not been resorted to by the carriers. It was, therefore, an open question whether the findings were proper and supported the order. In determining that question, the court turned to the decisions of the Supreme Court of Washington. Referring to the case of *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, the court said, p. 6:

> "If the Supreme Court of the State in the above case decided the case upon its construction of the State Statute, and, as a second ground, upon the lack of evidence to support the findings of the Department that the rate in question was unreasonable, the case is authority upon both points."

As above pointed out, the statute permits a review not only of the reasonableness of the order, but of its "lawfulness." (Laws of 11, Ch. 117, § 86). Whether the findings and order comply with the law both as to form and substance would clearly seem to be comprehended within the meaning of "lawful". If the findings and order were not in proper form, were not "direct and certain" or included improper matter, it was the duty of the carrier to have raised these questions by appeal or cross-appeal when the matter was submitted to the Courts of Washington. Had this matter been submitted to the courts, they might easily have remanded the case to the Department for

the purpose of redrafting the findings and order in lawful form instead of reinstating the findings and award of the Department as the Supreme Court did. In such a direct proceeding, counsel might, with better grace, have relied upon cases such as *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, 31, (cited App. Br. 256, 7, and followed in *Northern Pacific R. Co. v. Baker,* 3 Fed. Supp. 1) because the attack would have been direct instead of collateral. Direct attacks upon the validity of findings and order have been made not only in the State of Washington, but under the statutes of other states.

Peoples Fruit & Vegetable S. Assn. v. Ill. Com. Com'n, 184 N. E. (Ill.) 615;

Yowell v. Cleveland, C. C. & St. L. R. Co., 195 N. E. (Ill.) 667.

But to attempt, as appellant does in this case, to attack the lawfulness, i. e., form and sufficiency, and reasonableness of the findings and order of the Commission after they have been affirmed by the Supreme Court of Washington is a collateral attack upon such findings and order and is not available to the appellant.

The principle of the following cases is applicable:

Willipa Power Co. v. Public Service Com., 110 Wash. 193, 195, calling attention to the fact that only

if the order of the Commission is void is collateral attack permitted.

S. D. Warren Co. v. Maine Central R. Co., 135 Atl. (Me.) 526;

Public Service Com. v. City of Indianapolis, 137 N. E. (Ind.) 705;

Alabama Water Co. v. City of Attalla, 100 So. (Ala.) 490;

Southern Indiana R. Co. v. Railroad Com. of Indiana, 87 N. E. (Ind.) 966;

West Texas Compress & W. Co. v. Panhandle & S. F. Ry. Co., 15 S. W. (2d) (Tex.) 558, (Railroad Commission's interpretation on order or rule of the commission becomes part of the rule not subject to collateral attack.)

Texas Steel Co. v. Fort Worth & D. C. R. Co., 45 S. W. (2d) (Tex.) 794;

See also *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696. In action by sewer company against county to recover some claim for sewer service furnished, held whether the rates fixed by commission were unreasonable is a collateral question and will not be considered.

Also *Glen Falls Portland Cement Co. v. Delaware & Hudson Co.,* 66 F. (2) 490 (C. C. A. 2), holding that in suit to enforce reparation order for unreasonable rates charged, I. C. C. finding that rates were unreasonable is conclusive and evidence to the con-

trary cannot be introduced either as to past or future rates.

Batesville Telephone Co. v. Public Service Commission of Indiana, 38 Fed. (2d) 511;

New York and Pa. Co. v. New York Central R. Co., 126 Atl. (Pa.) 382;

Western R. Co. of Alabama v. Montgomery County, 153 So. (Ala.) 622.

Attention is also called to the fact that Laws of '11 ch. 117, §99 provide that the commission's order shall be conclusive unless set aside or annulled in a review as in the act provided.

It follows that the various cases cited by appellant on the question of the proper form of the findings (App. Br. 259-275) are not in point because they arise under the Interstate Commerce Commission Act, which Act, as has been above pointed out, has no provision similar to that of Washington for reviewing the reasonableness and lawfulness of the order in an independent judicial proceeding.

It is therefore submitted that the sufficiency of the findings and order, both as to form and substance, having been judicially determined by the Supreme Court of Washington, is either binding upon the Federal Court or at any rate highly persuasive, and that

therefore the objection urged to the admission of plaintiff's Exhibit 1 was properly overruled.

2. *Items to which objections are made are not improper.*

While appellant contended that the improper matters could not be culled out from the findings and order, it specifically objected to specific portions of the findings and the whole of the order, which objections are made the subject of assignments of error 5 to 22, inclusive.

Assuming that it is proper in this collateral attack to examine into the question of proper form of findings and order, it is first to be pointed out that nowhere do the statutes of the State of Washington prescribe the form and nowhere do those statutes say that findings and order in improper form are inadmissible, or that the portions that are improper, if embodied in the findings and order, are inadmissible. On the contrary, in the case of *Great Northern R. Co. v. Department of Public Works,* 161 Wash. 29, 32, in which the court in a direct attack upon the findings pointed out that they should be direct and certain, also stated:

> "It is not objectionable, of course, that the Department state the contentions of the parties or arguments used by them which it conceives

support, or militate against, the facts as found by it. . . . ''

As better form, the court also then proceeded to point out:

'' . . . but if uncertainty is to be avoided, these should be separately stated and not confused one with the other in the findings.''

Later in its decision, determining whether the findings were sufficient to support the order, the court said:

p. 34. ''However, the Department did find that 'the rate assailed is, and for the future will be, unreasonable to the extent that it exceeds 9 cents,' and this, possibly, is a sufficient finding to support its order, if there is substantial evidence in its support.''

Bearing these matters in mind, let us consider assignments of error 5 to 22, inclusive:

(a) Assignment 5. (Tr. 407).

The last three lines of finding 8 are clearly proper to explain finding 23, which adopts the Bureau method of scaling logs as correct.

(b) Assignment 6. (Tr. 407).

Finding 9 is essential in order to make finding 23 understandable.

(c) Assignment 7. (Tr. 408).

Finding 7 is essential to understand finding 23.

(d) Assignment 8. (Tr. 409).

This is a statement of a contention which helps to make finding 23 intelligible and which is clearly permissible even as a contention under the above cited *Great Northern Railway Co.* case.

(e) Assignment 9. (Tr. 410).

This is a finding helpful in making finding 23 intelligible and is likewise permissible under the *Great Northern Railway Co.* case, supra.

(f) Assignment 10. (Tr. 411).

This helps make finding 22 intelligible, and is permissible under the *Great Northern Railway Co.* case supra.

(g) Assignment 11. (Tr. 411).

A statement of the testimony helps explain findings 22 and 23, and while no more necessary than the statement of a contention, comes within the same principle. *Great Northern Railway Co.* case, supra.

(h) Assignment 12. (Tr. 412).

The same reasoning applies here as applies to Assignment 11.

(i) Assignment 13. (Tr. 413).

This is clearly a finding based upon the recitation of the preceding subsidiary findings and helps explain

the necessity for finding 22, and likewise comes within the principle of the *Great Northern Railway Co.* case, supra.

(j) Assignments 14 to 16, inclusive. (Tr. 414-418).

It is, of course, no more necessary to state the law in the findings than it is to state the contention of the parties, but it helps to explain the ultimate finding 22 as to the proper interpretation of board measure. It comes within the same principle as that permitting the statement of contentions. It is separately and distinctly stated and is not intermingled with any statements as to what the evidence in the case disclosed. Furthermore, the statements of the law therein contained are correct and applicable, and therefore not prejudicial even if inadmissible in the particular form in which presented. See *Gallagher v. Town of Buckley,* 31 Wash. 380, 384.

(k) Assignment 17. (Tr. 418).

This paragraph helps explain finding 22 and comes within the same principle heretofore suggested in the *Great Northern Railway Co.* case, supra.

(l) Assignment 18. (Tr. 419).

This finding helps explain finding 23, and is in answer to the carrier's contention that the Bureau scalers were inaccurate. This clearly comes within the *Great Northern Railway Co.* case, supra.

(m) Assignment 19. (Tr. 420).

This is clearly an essential finding. How else the Commission would have been justified in rendering reparation it is impossible to see. The objection here made is clearly frivolous.

(n) Assignment 20. (Tr. 420).

The same argument applies to assignment 20 as applies to assignment 19. Furthermore, the form of the finding comes within the language of the *Great Northern Railway Co.* case, supra.

(o) Assignment 21. (Tr. 421).

The same argument as was made to assignments 19 and 20 applies to this assignment.

(p) Assignment 22. (Tr. 421).

The admission of the order in evidene was clearly proper under the express terms of the statute which provide not only that the findings but the findings *and order* of the Department shall be admitted. Furthermore, the order expressly incorporates in itself by reference the findings of fact upon which it is based. (Tr. 422).

It is respectfully submitted, therefore, that under the decision of the Supreme Court of Washington, there is nothing improper or prejudicial in the find-

ings and order that require rejection of the whole or deletion of parts.

3. *In any event, the remedy is in the court's instructions.*

It will be recalled that the statute (Rem. Rev. Stat. 10433) provides that the "findings and order of the commission shall be *prima facie* evidence of the facts therein stated." That means the whole findings and order, and not such a part of the findings and order as a trial court finds constitutes findings and other after the Supreme Court has held them sufficient. Indeed, the very cases cited by appellant indicate that exclusion is not the only remedy, even under the Interstate Commerce Act, but that a proper method of presenting the matter is admission in the light of the court's instructions. Thus in *Western New York & P. R. Co. v. Penn. Refining Co.,* 137 Fed. 343, C. C. A. 3rd. (cited App. br. 259) the decision was reversed because to use the court's language (App. br. 262):

> "Not only did the paragraph in question from the report of the Commission include conclusions of law, *but the jury was instructed that these conclusions were findings of fact. In this there was error. . . .*"

Further, the court said, (App. br. 262):

"While not expressing the opinion that find-

> ings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter and direct that the latter be wholly disregarded."

In *Lehigh Valley R. Co. v. Meeker,* 211 Fed. 785, (App. br. 265), the action of the trial court in admitting an I. C. C. report containing improper matter was held error because (App. br. 269):

> "The court gave the jury to understand that the report of findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this we think the court was clearly in error."

On certiorari the Supreme Court of the United States, though holding that error as to the admission of a report was waived for lack of appropriate objection or requested instruction, held (App. br. 272):

> "If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged."

Furthermore, the court assumes that findings interwoven with other improper matter does not render the whole report inadmissible, for it states, (App. br. 272):

> "True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them. . . "

In the second *Meeker* case, (App. br. 274), the court said:

> "It hardly could be said that the presence of some irrelevant matters rendered the whole report inadmissible."

In the case at bar, the court admitted the whole of plaintiff's Exhibit 1, but limited its effect as follows in its instruction to the jury at the time of admission (Tr. 104):

> "THE COURT: Plaintiff's Exhibit 1 for identification has been offered and is now offered in evidence. Certain objections to it and to parts of it have been made as shown by the record by counsel for the defendant. I understand that the manner of identification and authentication is not questioned, and that it is the findings and order of the Department of Public Works concerning the matter of the alleged overcharge in question in this suit. The exhibit is now admitted in evidence as prima facie evidence of the facts therein stated."

In its charge to the jury, the court stated, (Tr. 316-318):

> "The Findings and Order of the Department of Public Works of the State of Washington touching the subject of this action have been

received in evidence before you, and the statute of that state makes such findings and order 'prima facie evidence of the facts therein stated.'

"You will note that it is 'the facts therein stated,' not the liability of the defendant, of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor statements, comments or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. You are not to consider anything contained in those findings and order except the facts therein stated.

"It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instrutions."

The court then proceeded to define the meaning of prima facie evidence, concerning which further argument will be made in answer to appellant's exceptions.

It will be seen, therefore, that appellant cannot claim to be prejudiced in light of the court's instructions. The method that the court uses in stating that the findings and order were prima facie evidence of the facts therein stated was clearly a matter in the trial court's discretion. It was not bound to give voluminous instructions to the jury as to what was and what was not a fact, or what was or what was not a contention, even if the question were still open for the court to do so. It will be remembered that the

instructions do not and did not go to the jury. It would have only resulted in confusing the jury to have attempted a more elaborate statement of the matter by the court. It is submitted the trial court did not abuse its discretion in the manner in which the jury were instructed and the appellant cannot claim prejudice.

The essential facts found in the findings were based on substantial evidence as the Supreme Court of Washington held, and the appellant must be deemed to have had a fair hearing before the commission. In light of these substantial facts, the technical objections raised by appellant, even if well taken, cannot be deemed to be prejudicial within the principle of *Western Railway of Alabama v. Montgomery County,* 153 So. (Ala.) 622, 625.

ANSWER TO NO. 23

(Tr. 107, 423; App. br. 125, 137, 146, 159, 172, 181, 192, 212, 247.)

Appellant assigns as error the refusal of the court to sustain defendant's challenge to the sufficiency of the evidence and motion for non-suit, or in the alternative, for directed verdict on the ground of insufficient facts to warrant recovery for plaintiff. This assignment of error is argued on a number of grounds,

which argument is also applicable to a number of other assignments of error as will be noted hereinafter under their proper heading. We shall consider each of the ten arguments made in support of this assignment.

1. Appellant argues tariff 51 is not ambiguous. We contend tariff 51 is ambiguous for two reasons:

(1). The Department and the Supreme Court of Washington so hold, making that holding a law of the state and binding upon the Federal Court.

(2). The term "board measure" in any case is a trade term and therefore subject to construction and interpretation based on parol evidence.

(1). It is the duty of the Department of Public Works to administer the Public Service Commission law, for it is provided in Rem. Rev. Stat. 10450:

> "It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal."

Rem. Rev. Stat. 10448 provides:

> "In all actions between private parties and public service companies involving any rule or order of the commission, and in all actions for the recovery of penalties provided for in this act, or for the enforcement of the orders or rules issued and promulgated by the commission, the

> said orders and rules shall be conclusive unless set aside or annulled in a review as in this act provided."

The departmental interpretation of board measure in tariff 51 filed pursuant to the requirements of Laws of '11, page 548, Rem. Rev. Stat. 10350, was affirmed by the Supreme Court of Washington, the court saying, 160 Wash. 691:

> "The tariff under which the logs moved not defining board measure, when the matter was presented it became primarily a question for the Department of Public Works to determine. . . . The Department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs. If it had adopted the railroad's method of scaling, that likewise would have become effective as to all shipments moving in this state."

The findings affirmed by the Supreme Court, therefore have a dual character. Insofar as findings of fact are concerned, their legal effect is to constitute prima facie evidence. Insofar as the interpretation placed upon the tariff is concerned, that is a function which the statute fixed in the Department subject to review by the Supreme Court, and upon review, if affirmed, becomes the law of the state, binding upon state and federal courts alike.

The tariff, so long as it is in force, is like a statute, (*Pennsylvania R. Co. v. International Coal Co.,* 230

U. S. 184, 197) and the construction of such a statute by the body primarily charged with its construction after affirmance by the Supreme Court, is a construction which in effect is part of the statutory law of Washington and binding on shipper, carrier and the courts. The Supreme Court having held that the term "board measure" is subject to construction, the appellant cannot now contend that it is not.

(2). Assuming, however, that the question is still open, it appears beyond question that the term "board measure" is subject to interpretation and construction. While appellant states that the only testimony is that board measure is not ambiguous, (App. br. 131) it overlooks the mass of testimony admitted to show that other railroads use the commercial scale in computing their freight charges under the identical tariff 51; that the logging industry and log shippers use the commercial scale in computing their freight charges; that the Department and the Supreme Court of Washington likewise interpreted board measure to mean board measure commercial scale. The appellant, however, is the only one contending that there is no ambiguity latent or patent in the term. No authorities are cited for the position taken. Appellant's contention overlooks the principle stated in 22 C. J. 1204 as follows:

> "*Words having both popular and technical meaning.* It is not necessarv in order that this rule may apply that the word or phrase should have no fixed meaning in ordinary usage, for even though it has such a meaning, yet if it also has a technical meaning in the language of commerce or art, parol evidence is admisssible to show that it was used in the latter sense . . . "

Numerous illustrations of this principle are then given.

In *Hurst v. W. J. Lake & Co.,* 16 Pac. (2d) (Ore.) 627, the court stated the law as follows:

> " . . . We state our conclusion that members of a trade or business club who have employed in their contracts trade terms, are entitled to prove that fact in their litigation. . . We believe it safe to assume, in the absence of evidence to the contrary, that when tradesmen employ trade terms, they attach to them their trade significance. If, when they write their trade terms into their contracts, they mean to strip the terms of their special significance and demote them to their common import, it would seem reasonable to believe that they would so state in their agreement. Otherwise they would refrain from using a trade term and express themselves in other language."

In *Paepcke-Leicht Lumber Co. v. Talley,* 153 S. W. (Ark.) 833, there was involved an action to recover damages for breach of contract whereby plaintiff agreed to sell lumber at the price of "$14.00 per thousand feet board measure . . . "

In holding contrary to the defendant's contention

in that case that board measure had its ordinary meaning (just as appellant here contends), the court said, page 836:

> "Now, a literal interpretation of the term 'board measure' would imply a measurement of lumber, like all other substances having the three dimensions of length, width, and thickness, according to the number of cubic inches contained in the surface of one foot; that is to say, the unit of one foot should be counted as one foot long, one foot wide, and one inch thick, which is equivalent to 144 cubic inches of lumber. But the use of that term does not necessarily imply the intention to give it its literal meaning, for it may mean only the manner in which a board is ordinarily measured; and it is subject to explanation according to the particular circumstances under which it is used. In other words, it was competent to show that it is a commercial term, and is understood to imply a particular meaning in commercial circles. According to the great preponderance of the testimony, the custom is well-nigh universal in the lumber trade for sales to be made in accordance with the measurement contended for by the plaintiff as to lumber less than one inch in thickness; and there is some testimony to the effect that the term 'board measure' is generally understood to mean the surface measurement of boards one inch, and less, in thickness."

It will be remembered that the term "board measure" was originally used in the Long-Woodworth agreement immediately before the filing of tariff 51. It was used by lumber and railroad men engaged and long engaged in the shipment of logs. It is not con-

tended by appellant that the use of the term board measure as used in the Long-Woodworth agreement was changed in any respect by the use of that term in tariff 51. Under these circumstances it is clear that the term board measure was used as a trade term, and subject, therefore, to interpretation and construction. See *Union Wire Rope Corp. v. Atcheson etc. Ry. Co.*, 66 F. (2) 965 (C. C. A. 8th) involving undefined trade terms in tariff.

Appellant contends that the exception in tariff 51 (App. br. 131, 135) removes any ambiguity that might otherwise exist as to the meaning of the term "board measure". But this it fails to do, for the question remains whether board measure is implied in the exception as it is implied in the use of the phrase dealing with rates "rates in cents per thousand feet," (App. br. 131). Furthermore the question remains whether the exception was intended to be a basis for rate measurement or merely a checking up device.

Appellant then contends that trade usage in the Puget Sound area does not create ambiguity. (App. br. 133-135). But even if this were true, there were other reasons that warranted construction of the term "board measure," particularly the practice of other carriers under tariff 51 of interpreting tariff 51 to mean "board measure commercial scale".

2. Appellant contends in passing that plaintiff did not comply with the exception in tariff 51 (App. br. 135) in failing to give the carrier the actual number of feet of logs in each car as shown by mill overrun. The answer to this contention is as follows:

(1). If tariff 51 means "board measure commercial scale" by the use of the Scribner Decimal "C" stick, the objection must fall.

(2). The exception reasonably interpreted does not mean literally the *actual* number of feet of logs on each car, because the carrier's own construction of the tariff is to the contrary as shown by its practice is to measure the content of logs by the use of the Scribner Decimal "C" Scale. The use of that scale itself, without any deductions for defects, results in mill overrun, as appears from the excerpt from appellant's brief page 135. As the Supreme Court said in *Northern Pacific R. Co. v. Sauk River Lumber Co.,* 160 Wash. 691, in holding evidence of mill overrun immaterial:

> "No method of scaling can be mathematically correct and determine by the scale the exact amount of lumber that may be cut from a log. . . . Of course, it would be impractical to base a freight rate, and collect therefor, upon the basis of the actual cut at the mill from the logs."

(3). If appellant's contention were correct, recov-

ery in overcharge cases would be impossible where the carrier had dumped the logs so that the car identity had been lost. This would be true even if the carrier itself applied the wrong principle in measuring the logs. It would enable the carrier to profit by its own wrong. Such an interpretation is to be rejected.

(4). The objection is untenable in any event, because the carrier itself scaled the logs. The plaintiff is merely offering the best evidene it can as to the number of feet of logs on the cars. The departmental finding as to the correctness of its evidence has been affirmed by the Supreme Court and accepted by the jury. To contend, therefore, that appellee failed to make out a cause of action because it did not measure the actual number of board feet carried on each car would seem erroneous indeed.

3. Appellant contends that in any event the construction permitting commercial scale to govern is erroneous. (App. br. 137). It argues that the construction reads the exception out of tariff 51, and that it is unreasonable since it results in the carriage of logs or parts of logs without compensation, and further enables shippers to change the freight rates by changing the definition of a cull. The answer to these contentions is:

(1). The method of ascertaining the meaning of the tariff has been conclusively stated by the Department of Public Works and the Supreme Court of Washington, and is part of the law of the State of Washington. It is no longer an open question that is subject to collateral attack.

(2). Appellant's interpretation reads the term board measure out of the tariff, since board measure is a trade term. It is an attempt to make the exception which might have been adopted for checking rather than rate making purposes do the work of a proper definition of the sense in which board measure was used. It is by no means a necessary or inevitable interpretation of tariff 51 that because item 50 deals with scaling that it necessarily deals with scaling for rate making purposes.

(3). Nor is the interpretation of the commercial scale unreasonable on the ground that it results in the carriage of logs without charge. It is to be conclusively presumed in this proceeding that the rates are reasonable and are adjusted to the fact that culls and other defects are not to be charged for. *Hence there is no free carriage in fact, despite the form of the matter.* If the compensation is inadequate there is a rate making procedure available for the purpose of fixing adequate rates. What is involved in the

position taken by appellant is a collateral attack on the sufficiency of the rates under the guise of an aid to interpretation (See Br. p. 92).

Tonopah Sewer & Dr. Co. v. Nye County, 254 Pac. (Nev.) 696;

Northern Pacific Railway Co. v. Sauk River Lumber Co., 160 Pac. 691;

State ex rel v. Department of Public Works, 149 Wash. 129, 134.

(4). Appellant contends that it is within the shipper's power to change the freight rates by changing the definition of a cull. There are two answers to this contention:

(a). A carrier may under the statute file a scaling rule that will protect itself against such action. (R. R. S. 10350).

(b). It is not to the shipper's interest to change the definition of a cull or add deductible defects for the purpose of saving $2.50 per thousand on freight and losing $15.00 per thousand on the selling price; hence the danger suggested is not only remote, but highly unlikely. As the appellant's witness Mr. Evans testified:

> (Tr. 117). "It is true that the more footage that is scaled under the commercial scale the more the logger gets from the mill. It is, therefore, to the logger's interest to get as large a scale as he can out of his logs."

4. Practical Construction.

Appellant contends (App. br. 146) that under the undisputed evidence of practical construction of the tariff by both appellant and appellee, tariff 51 means board measure Northern Pacific scale, and can only mean that. Our answer is:

(1). The method of ascertaining the meaning of tariff 51 has been conclusively settled by the Department and the Supreme Court of Washington contrary to appellant's contention, and it is no longer an open question in this case for collateral attack.

(2). If open, the evidence fails to show the practical construction contended for by appellant. Tariff 51 under which this proceeding was held and which for the first time in an effective tariff used the term board measure (Tr. 274), had only been filed since October 1, 1925. (Tr. 212). The practical construction of that tariff was not uniform on the part of the carriers. It was a joint tariff, and apparently the Northern Pacific was using its so-called Northern Pacific scale, and the other carriers parties to the tariff, such as the Milwaukee and Great Northern, were using the commercal scale. (Tr. 250, 261, 264, 265). Therefore there was no uniform practical construction.

Furthermore, the rule as to practical construction

is based upon a practice knowingly indulged in by both shipper and carrier, as the cases cited by appellant clearly disclose. (App. br. 147-154). Yet the evidence is that shippers on the Great Northern and Milwaukee lines use the commercial method in scaling, and the Sauk River Lumber Company assumed that the Northern Pacific was using the commercial scale. (See Br. p. 7). There was no evidence that the Sauk River Lumber Co. checked the action of the Northern Pacific Railway in scaling until Mr. Jamison employed Mr. Fishbeck to act as joint scaler for the Sauk River Lumber Company and Northern Pacific in 1927, so that he could determine what was wrong with what seemed to be an excessive scale. (Tr. 277). So far as the compromise agreement evidenced by letters set out in Appellant's brief 156, 157, are concerned, it will be noted that Mr. Jamison offered to compromise the overscale at the suggestion of Mr. Evans, the Northern Pacific head scaler, (Tr. 277) and in his offer to compromise he did not offer a compromise on the basis of any alleged full Northern Pacific scale, but on the basis of the commercial scale, less 50% of the gross scale for cull logs. That was clearly a compromise offer. This was especially evident when the last sentence of his letter (Tr. 159) is read, reading:

> "*In this instance,* we are willing to add to our commercial selling scale all deductions and 50% of the gross scale of all culls and take that figure for the basis of adjustment." (Italics ours).

The fact that settlement was made on the basis of the Bureau scale plus deductions as a matter of compromise is certainly no indication of any acquiescence on the part of the Sauk River Lumber Company that the commercial scale should not be used. When a man is owed money, he is willing to compromise his rights for the purpose of saving the expense incident to asserting them. In view of this fact, it certainly cannot be said that the undisputed evidence shows that the shippers acquiesced in any alleged Northern Pacific Scale. (See Br. p. 7).

Furthermore, the construction contended for by the Northern Pacific would result in discrimination between shippers under the same tariff. Shippers on the Milwaukee and Great Northern paid on the basis of the commercial scale. The Northern Pacific contends that shippers on the Northern Pacific should pay on the basis of the Northern Pacific Scale. In view of the fact that freight charges are all computed on the basis of the same joint tariff 51, such an interpretation is clearly discriminatory and to be avoided.

Finally, practical construction in any event isn't

binding or conclusive as appears from appellant's brief page 152. At most it is merely one aid, and only one, to the determination of what a tariff means.

It is submitted, therefore, that practical construction of the tariff would favor the appellee rather than appellant, and that appellant's argument based on practical construction must fail.

5. Contention that commercial scale results in an interpretation which renders the tariff illegal. (App. br. 159).

More specifically, the illegality consists in alleged confiscation, discrimination and free carriage. Our position is:

(1). The question of how to ascertain the meaning of tariff 51 is no longer an open question, having been settled by the Department and the Supreme Court of Washington.

(2). If not settled, the question of sufficiency of rates on the issues of confiscation, discrimination and free carriage, is irrelevant in this proceeding.

(3). In any event, the evidence offered as to confiscation, discrimination and free carriage purporting to apply only to one party to joint tariff No. 51, namely the Northern Pacific, was inadmissible, since

the evidence should have been offered as to all carriers.

We shall discuss each contention in turn.

(1). That the decision of the Department and the Supreme Court of Washington is as to method of interpretation conclusive and not subject to collateral attack as to the meaning of tariff 51 has already been discussed. (Br. pp. 17, 60, 78).

(2). In any event, the question of the sufficiency of rates to prevent confiscation, free carriage and discrimination is a question which shoud be raised in a direct proceeding provided for that purpose by the statutes of the State of Washington. In a reparation proceeding, the question of the sufficiency of the rates as bearing upon the meaning of the tariff is immaterial. The qustion is, what does the tariff mean, not, will the tariff as construed result in a sufficiency of rates. In a collateral proceeding, it is conclusively presumed that the rates filed are sufficient until set aside in the manner provided by statute. That the question of the sufficiency of rates is immaterial in a reparation proceeding, see *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691;

State ex rel v. Department of Public Works, 149 Wash. 129, 134;

See Robinson v. Wolverton Auto Bus Co., 163 Wash. 160, 163;

Tonopah Sewer & Dr. Co. v. Nye County, 254 Pac. (Nev.) 696;

Mellon v. Johnson Co., 219 N. W. (Wis.) 352, 353.

It will be remembered that tariff 51 was *voluntarily* filed by carriers. This is not a case where the Department compelled the carriers to fix a confiscatory, discriminatory and unlawful rate. We are concerned here in interpreting the voluntary action of the carriers themselves. According to the appellant's own testimony, the rate filed at $2.50 per thousand was less than the rates under tariff 29, which the carriers had filed as a reasonable rate, and which they claimed was put into effect when the Supreme Court of the United States reversed the action of the Department of Public Works in fixing a confiscatory rate. Under tariff 29 the rate charged was $3.20 per thousand feet. Under tariff 51 the carriers, as a matter of compromise, voluntarily filed a rate of $2.50 per thousand feet, which according to their own contention at the time was less than reasonable. (App. br. 23, 24). If the cariers can now turn around when an action is brought to construe the very tariff they voluntarily filed and contend that the departmental construction of commercial scale renders the tariff confiscatory, the car-

riers might just as well contend that the rate of $2.50 is void because confiscatory, and that a reasonable rate such as $3.20 per thousand feet should be charged. The absurdity of this position is apparent. One cannot voluntarily do something claimed by him to be unwise and then claim that the legal consequences flowing from such voluntary act deprive him of due process.

In *Pennsylvania Fire Ins. Co. v. Gold Issue etc. Co.*, 243 U. S. 93, 37 S. Ct. 344, the court through Mr. Justice Holmes pointed out in distinguishing between a voluntary consent and a statutory consent, which is, of course, involuntary in character:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act."

What the carrier in this instance by its voluntary act has in effect done is to waive its right to invoke the due process clause on this point.

The various cases cited by appellant on the question of legal and illegal interpretation, it should also be pointed out, are cases either of direct attacks in a rate making proceeding on the sufficiency of the rates, or under the Interstate Commerce Commission Act in which the rates are assailed for the first time when

the order reaches the first trial court. (App. Br. 161-165). This is quite different from rates fixed under a state act with a special procedure as to how the sufficiency of rates shall be fixed and determined.

From what has been said, it must also appear that the contention as to the interpretation resulting in free carriage of cull logs must also fall. It must be conclusively presumed in this proceeding that the rates are adjusted to the fact that cull logs will be carried without ostensible charge. It is not necessary that there be an ostensible charge for each unit carried. It is perfectly possible to make a charge for certain units carried in contemplation of the fact that other units will not be used for the purpose of calculating the amount of freight to be charged. Naturally there will be a higher rate to be charged upon the fewer units which furnish the basis of calculation, but in substance there will be a payment made for all the freight carried irrespective of the form or method by which the amount of freight is calculated.

Furthermore, the existence of free carriage is not as serious as appellant contends it is. It will be recalled that under tariff 51 the shipper is required to pay a minimum on the basis of 6,000 feet per car, whether he actually ships that number of feet or not. Indeed, as appears from the findings of fact, the

shipper in his calculations was compelled to pay for the difference between 71,794,990 feet and 70,326,280 feet at $2.50 per thousand, or $3,671.78 (Tr. 80, 81), said sum being paid even though logs were not actually shipped on the cars to make up the 6,000 foot minimum. This figure of $3,671.78 should be compared with the freight on culls which appellant contends should have been paid, amounting to $4,069.73. (App. br. 171). The foregoing facts furnish some justification, therefore, for Mr. Jamison's statement (Tr. 278):

> "I do not think that the railway should charge for hauling culls if there is a minimum based on commercial scale."

Nor should the fact that culls are occasionally shipped because of the difficulty of telling a cull in the woods and in such cases occasionally salvaged for wood purposes, obscure the important facts. It will be remembered that a shipper who sells culls to a buyer for lumber purposes gets nothing for them from him, any more than he gets anything for the board measure which would be contained in the defects of timber. It is, therefore, not to the interest of the shipper to go to the trouble of cutting, loading and shipping culls when he gets, if he gets anything, not more than one fifth of the ordinary price of logs.

(Tr. 238). There is no evidence in this case that culls were cut and shipped as a commercial matter. The evidence is merely that when they were inadvertently shipped they were sometimes salvaged and sold for wood.

While we call attention to these matters in order to minimize the so-called free carriage, we particularly do not wish to obscure the fact that in this proceeding the rates must be conclusively presumed to be adjusted to the fact that such free carriage in form as may exist has been taken into account in fixing the rates.

Illustrative of this principle is the fact that even the appellant's Scribner Decimal "C" Scale does not measure the full mercantile content of the log as is shown by so-called mill overrun, and that to the extent that it does not do so, there results free carriage in form though not in fact.

But appellant states that the application of the commercial scale would render tariff 51 discriminatory, (App. br. 168), because different commercial scales are used in different logging districts. But the evidence is that the commercial method of deductions is the same in all districts. The only difference in the districts is the method of measuring the gross content, which methods result in a small difference.

(Br. pp. 4, 5). But the interpretation given by the Department is that the Scribner Decimal "C" Stick is the proper method of measuring the gross content. Hence the measurement of gross content may be as uniform when the commercial scale is used as it is when the so-called Northern Pacific scale is used. Furthermore, deductions for defects and culls being uniform, the gross scale less deductions will likewise be uniform when it comes to measuring board measure for freight purposes. No discrimination can therefore possibly result from the interpretation placed upon tariff 51 by the Department and the Supreme Court of Washington. As that court said in its decision:

> "It is said that this construction will result in discrimination, but we think just the opposite is the effect. The Department having construed the tariff, it necessarily follows that it will be applicable to all shipments of logs.'

On the contrary, the Northern Pacific interpretation does result in discrimination since shippers on the Milwaukee and Great Northern have received the benefit of the commercial scale under the same tariff 51. That was why the Supreme Court of Washington in the aforesaid decision also called attention to the fact:

> "Inferentially, it appears that the other railway companies which were parties to the tariff

have carried logs for charges which were based upon the scale of the scaling bureau.'

(3) It will be remembered that tariff 51 is a joint tariff, application not only to the Northern Pacific but to the Milwaukee, Great Northern and Oregon-Washington railways. It would be wholly incompetent for a construction of a joint tariff to rest upon the question whether the rates and charges prescribed in such joint tariff are sufficient to yield one of the carriers a sufficient return on its investment. Suppose that the rates were insufficient as to one carrier but sufficient as to the other three. Would it be contended that the tariff would be interpreted one way as to the Northern Pacific and another way as to the other carriers, despite the fact that the same language is applicable to all? Unless, therefore, the appellant offered evidence to show the so-called confiscatory character of tariff 51 interpreted so as to require the commercial scale as being confiscatory or discriminatory or resulting in unlawful free carriage as to all the carriers, the evidence offered would clearly be insufficient and inadmissible. That the Northern Pacific intended to confine the evidence only to the practice of the Northern Pacific appears not only from its offers of proof, but also from the vigor with which it

sought to exclude from the testimony the practices of other railway carriers (Tr. 250, 261, 265).

6. Estoppel.

Appellant contends that the evidence shows that the Sauk River Lumber Company knew that the railroad was applying other than the proper and commercial scale during 1926, and that because it delayed protesting to the Northern Pacific until after all the shipments had been made in 1926 that it is estopped to recover in this case (App. Br. 172-180). Our answer is:

(1) This estoppel was not pleaded. The only estoppel pleaded was the so-called estoppel arising from the Long-Woodworth agreement (Tr. 22).

(2) There was no evidence to support this ground at the conclusion of the plaintiff's case in chief.

(3) There was no evidence to support a claim that the Sauk River Lumber Company knew of the Northern Pacific's practice until after 1926.

(4) There could be no estoppel where parties deal at arms length, and where the silence at best amounts to a representation of opinion as to the law.

Discussing each point in turn:

(1) Estoppel is an affirmative defense and must, of course, be pleaded.

Johns v. Clother, 78 Wash. 602, 139 Pac. 755;

Russell v. Mutual Lumber Co., 134 Wash. 508, 236 Pac. 96;

Walker v. Baxter, 6 Wash. 244, 33 Pac. 426.

Not having been pleaded in this case, this contention is not available to appellant.

(2) and (3). Furthermore, the motion in support of which this argument is urged was made at the conclusion of plaintiff's case in chief; but at that time there was no evidence whatsoever as to knowledge or lack of knowledge on the part of the plaintiff of the Northern Pacific practices until after 1926.

Furthermore, it has just been shown, *supra* (Br. p. 7), that the Lumber Company never did know that the Railway Company was using any but the commercial scale. This appeared both in the testimony of Mr. Irving and Mr. Jamison (Br. p. 7, 88). Furthermore, it appeared in defendant's own case that the commercial scale was claimed to be the proper scale within ninety days after tariff 51 was filed. Indeed, when Mr. Jamison made a claim for refund for overcharge, he based his claim

by way of compromise on the commercial scale but allowed 50% of the footage of culls. That claim was first made February 15, 1926 (App. Br. 157), and therefore warrants the statement of Mr. Cleveland that (Tr. 215):

> "I think the Sauk Company first demanded the commercial scale about ninety days after tariff 51 became effective."

Despite the knowledge of the Sauk claim, the Northern Pacific did nothing to protect itself by filing its scale rules. It must follow, therefore, that there is no ground for any alleged estoppel such as that urged.

(4) The circumstances under which tariff 51 was promulgated, were equally known to the Sauk River Lumber Company and to the Northern Pacific Railway Company. It was merely a matter of the proper interpretation of board measure, and that interpretation was equally within the knowledge or power to obtain knowledge of both parties. Under such circumstances, where parties deal at arms length, one party cannot, by failing to assert its interpretation or opinion as to the law, estop itself from relying thereon.

See 21 C. J. 1142;
Turner v. Spokane County, 150 Wash. 524;
Jordan v. Corbin Coals, Ltd., 162 Wash. 503.

Furthermore, there is a public policy involved in requiring the carrier to charge according to rate schedules on file (R. R. S. 10350), whch public policy is not to be defeated by estoppel. Thus it has been generally held that a railway is not estopped from insisting upon its filed rate, even though it has collected less than that rate. Payment is not an accord and satisfaction and the carrier can recover.

See *Melody v. Great Northern Railway Co.,* 127 N. W. (S. D.) 543;

Robinson v. Wolverton Auto Bus Co., 163 Wash. 160;

Jenckes Spinning Co. v. New York etc. Co., 129 Atl. (R. I.) 815;

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541.

It has also been held that a contract for a rate less than a filed rate or subsequently filed rate cannot be the basis of an estoppel against the carrier from enforcing the filed rate.

Producers' Trans. Co. v. Railroad Commission of Cal., 251 U. S. 228, 40 S. Ct. 131, 133.

Seaman v. Minn. & R. R. Railway Co., 149 N. W. (Minn.) 134.

Mellon, Director General of Railroads v. Johnson Co., 219 N. W. (Wis.) 352 (misquotation of rate).

One cannot by the device of estoppel validate a void contract.

Stratford v. Fidelity & Casualty Co., 137 Atl. (Conn.) 13;

Geddis v. Bank, 145 Atl. (N. J.) 731.

For each of the above four numbered reasons the estoppel claimed cannot be asserted.

7. Appellant next contends that motion to dismiss should be granted because appellee failed to show that the rates actually charged were unreasonable to its damage (App. Br. 181). We contend:

(1) That the burden of showing the rates to be unreasonable is on the carrier and not on the shipper, so that motion to dismiss at the end of plaintiff's case in chief was premature.

(2) The Washington statutes do not require damage in addition to proof of overcharge to warrant recovery.

(3) Appellant's authorities are not in point either on proposition (a), that proof of damage is essential in reparation cases under the I. C. C., or (b), that carrier may recover a reasonable freight charge though tariff was not on file, since in this case tariff 51 as construed was filed.

(1) Even if the question of reasonable rates could properly be said to be in this case on the theory that they might be collaterally inquired into, the presumption would be that the rates named in tariff 51 were reasonable and sufficient, thereby placing upon the defendant the burden of showing that they were not. Hence at the end of the plaintiff's case, there being no evidence that the rates were unreasonable, any motion to dismiss based on the necessity of the plaintiff proving the rates to be unreasonable would necessarily fall, since the presumption that they were reasonable would require the carrier to rebut the same. At this point it might be well to point out the inapplicability of *Atlantic Coast Line R. Co. v. Florida,* 79 L. Ed. 719, cited appellant's brief, p. 191. That case is not in point on a motion to dismiss at the end of the plaintiff's case in chief, since the confiscatory character of the rates has not yet been shown at that stage of the proceedings. But that case is to be distinguished from the case at bar in the following important respects in any event: (a). That was a suit in equity (which if in a law action would have constituted an action for moneys had and received), governed by equitable considerations. (b) The shippers in that case were seeking to take advantage of the procedural blunders of the commission, the substantive decision

of the commission being, however, correct. (c) That was not a reparation case for failure to apply the rate filed properly construed. (d) The rates sought to be applied had been held confiscatory in a direct proceeding. Here the rates have never been held confiscatory in a direct proceeding. On the contrary, they are not only prima facie reasonable, but they are conclusively reasonable in case of a collateral attack. (e) Here the equities are with the shipper, not with the carrier as in the Florida case, because: (1) The shipper is trying to get the same treatment on scaling practices as other carriers give their shippers under the same tariff. (2) If appellant's contention is correct, a carrier would be in a position to treat shippers of the same class differently, and when met with a claim for reparation could always contend that because the rates were insufficient, reparation should be denied. The effect of such a holding would be to permit, through an ingenious argument, the perpetration of discrimination contrary to the very purpose of the statutes forbidding it (R. R. S. 10354, 10356).

No such equities existed in the Florida case. On the contrary, the predominant equity in that case was clearly with the carriers, the shippers in that case seeking to hold the carriers responsible for the pro-

cedural not substantive blunders of the commission.

(2) The state statute does not require damage to be shown in a reparation case other than overcharge (R. R. S. 10433; see also R. R. S. 10422, providing that no complaint shall be dismissed because of the absence of direct damage to the complainant). This point should be noted because the decisions under the I. C. C. requiring damage to be proved rests solely upon the requirements of the statutes and not upon any common law requirement.

(3a) The authority cited requiring a showing of damage is clearly not in point (App. Br. 190). Under the I. C. C. forbidding discrimination, and forbidding a different rate for short and long hauls, the Supreme Court of the United States has held that special damage must be proved, but in reparation cases it has held that no special damage need be proved other than the fact of overcharge. Thus the case of *Davis v. Portland Seed Co.* (App. Br. 190), involved a violation of the long and short haul provision of the I. C. C. Even that case pointed out, 44 S. Ct. 383, that there was a distinction between overcharge and damages. The court quoted with approval from *Pennsylvania R. R. Co. v. International Coal Co.,* 230 U. S. 184, 33 S. Ct. 893:

> "But the English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge . . ."

In *Southern Pacific Co. v. Darnell Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186, ruling contrary to *A. T. & S. T. R. Co. v. Spiller,* 246 Fed. 1, cited appellant's brief, p. 165, the Supreme Court held that damage other than a showing of overcharge was not a required showing. The distinction in the different classes of cases is set out in *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 17, 46 S. Ct. 73, 79:

> "The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 206, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, to be fatal in a suit under Section 2 (Comp. St. §8564) for unjust discrimination, and in Davis v. Portland Seed Co., 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762, to be fatal in a suit under Section 4 (Comp. St. §8566), for violation of the long and short haul clause. The carrier concedes, as it must under Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451, that a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

See, *Coad v. Chicago etc. Railway Co.,* 154 N. W. 396;

Ft. Morgan Bean Co. v. Chicago etc. R. Co., 288 Pac. (Kan.) 589.

Sunset Pacific Oil Co. v. Los Angeles etc. Co., 290 Pac. (Cal.) 434.

(3b) Appellant cites cases to the effect that in the absence of a tariff provision a reasonable charge may be collected for freight carried (App. Br. 183). The applicability of this rule to this case seems difficult to follow. Tariff 51 was filed and freight was moved under that tariff. That tariff has been construed to mean rate in cents per thousand feet board measure commercial scale. The rule and the authorities cited for it are therefore inapplicable. When it is said that the carrier should have filed its scaling rule, it is said in connection with the proposition that if board measure means something other than board measure commercial scale as the term is used in trade, the carrier should have filed a scaling rule so stating. This is not a case involving the question as to what is a reasonable scaling method when none is stated in the tariff (compare what is a reasonable freight charge where no rate is filed), but rather what is the meaning of the tariff filed with respect to scaling practices. Appellant's statement of the matter, therefore, misconstrues the issue involved.

It is submitted that appellant's contention as to the necessity of proving damage through unreasonable rates must fall.

8. Unpublished scaling rules.

Appellant next contends that the unpublished scaling rules of the Northern Pacific are binding (App. Br. 192). We contend:

(1) Insofar as this affects the meaning of tariff 51, the question is no longer open.

(2) An unpublished scaling rule is void.

(3) There is no evidence that the same unpublished rule was that of the other carrier parties to tariff 51.

(4) An unpublished scaling rule contrary to a filed tariff is void.

Discussing each contention in turn:

(1) The Supreme Court of Washington construed "board measure" to mean "board measure in its commercial sense," and rejected appellants view of the law. Appellant cannot depart from the law laid down by the Supreme Court of Washington on the point.

(2) R. R. S. 10350 requires:

> "Every common carrier shall file with the commission . . . any rules and regulations which may, in any wise, change, affect or determine any

part or the aggregate of such aforesaid rates, fares and charges . . ."

R. R. S. 10354 provides:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property . . . than the rates, fares and charges applicable to such transportation *as specified in its schedules filed and in* effect at the time; . . ."

As pointed out in our cross-appellant's brief, pages 15 to 23, the carriers scaling rules were therefore required to be filed to become effective. Indeed, as stated in *Clark v. Southern Railway Co.,* 119 N. E. (Ind.) 539, 542:

"The schedule of rates, fares and charges and the regulations filed with the Interstate Commerce Commission are binding on both carrier and shipper or passenger . . .

"Any rule or regulation required by the act to be filed with a schedule and which changes, affects or determines the value of the service rendered to the passenger or shipper, is unlawful and void if not so filed. Baltimore etc. Co. v. Hamburger (C. C.), 155 Fed. 849."

To the same effect see *Vanderberg v. Detroit & C. Nav. Co.,* 186 N. W. (Mich.) 477, 478;

See also *Macfadden v. Alabama Great Southern R. Co.,* 241 Fed. 562 (C. C. A. 3rd).

The appellant cites cases (App. Br. 196, 198), which it contends announces the rule that unpublished scaling rules are binding. An examination of the cases

cited will disclose that not one involves the question whether an unpublished scaling rule is binding. The most that the cases can be said to hold is that where for reasons of insufficient evidence or improper procedure, reparation must be denied, the effect of such denial may be to treat an unpublished rule *as if* it were valid (See Cr. App. Reply Br.). Thus, in the Interstate Commerce Commission cases (App. Br. 196, 197), the unpublished rules as to estimated weights were given effect not because they were valid, but because the evidence failed to show that the weights actually charged for were incorrectly computed. Had the evidence been satisfactory on that question, freight upon the actual weight and not upon the weight as calculated by the unfiled rule would have governed. Far from holding that unfiled rules are valid, the cases proceed upon the assumption that they are invalid but that reparation will be denied unless proper proof be made of the actual weights shipped. Any other view would read out of the statute the mandatory requirement about filing all rules.

In *Suffern Hunt & Co. v. Indiana Decatur & Western R. Co.,* 7 I. C. C. 255, it was held that rules or regulations promulgated by the carrier in circulars issued independently of its rate schedules are not law-

fully in force; hence circulars prescribing the rules for maximum and minimum carload rates for grain are not binding and reparation will be ordered.

In re Alleged Unlawful Charges, 8 I. C. C. 585, it was held that published tariffs specifying the rates per standard crate of vegetables shipped from Florida should state plainly the weight or dimensions of the crate to which the weights apply. See also *J. R. Wheeler Co. v. Director General,* 59 I. C. C. 699.

Whatever may be the rule where unimportant regulations are involved, it is clear that a rule, the effect of which substantially affects the amount of freight charges paid, must be held to come within the statute requiring the filing of such a rule in the schedules. Certainly if the Department of Public Works has ruled that such a scaling rule must be filed, it is a ruling which is entitled to great weight, as an interpretation by the executive department charged with the administration of the statute. Especially is this view persuasive because it is supported by the rulings of the Interstate Commerce Commission under the I. C. C. relating to weighing for the purpose of computing freight charges. Weighing and scaling are analogous.

(3) A further answer to appellant's contention is

that there was no evidence nor any offer to show that the Northern Pacific's unfiled and unpublished scaling rule was also the rule of the Great Northern, Chicago, Milwaukee & St. Paul Railway and the Oregon-Washington Railroad. Tariff 51 being a joint tariff, it would be improper to permit the Northern Pacific to impose its scaling practices and thereby secure treatment preferential to that secured by the other carriers, there being but one and the same tariff applicable. Even, therefore, if an unfiled scaling rule is valid, it will be necessary under a joint tariff to show that the unfiled scaling rule was the same for all the carriers.

(4) In any event, if "board measure," as used in tariff 51, means "board measure commercial scale," unpublished scaling rules contrary to the tariff actually filed would, of course, be unenforcible.

9. Appellant next contends that the Long-Woodworth Agreement is a bar to the shipper's claim for reparation (App. Br. 212). We contend:

(1) There was no proof that the Long-Woodworth agreement provided for the Northern Pacific scale on which to base an estoppel.

(2) Even if it did, it would be voidable and subject to a subsequently filed tariff providing for the

commercial scale, and could not be the basis of an estoppel.

(1) The evidence showed that the Long-Woodworth agreement was an agreement between all the carriers and most of the shippers. It was not merely an agreement between the Northern Pacific and the Sauk River Lumber Company (Tr. 188, 189, 200). The same language was used in the agreement as was used in the tariff, namely, "board measure" (Def. Ex. "A." 25; Tr. 180). As Mr. Long testified (Tr. 200, 201):

> "The memorandum of agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling. There was to be no change. I think the theory of this was that the scaling method was settled and *uniformly* applicable to all the railroads." (Italics ours.)

He also testified:

> "The letters "B. M." on the memorandum agreement mean "board foot log scale." It is determined by scaling the logs. At no time during the conference do I recall any reference to the subject of scaling the logs . . . I do not know the way the Northern Pacific scaled at the time of this conference."

The evidence also showed that Mr. Long representing the loggers was employed by the Weyerhaeuser Timber Company, and that one of its subsidiaries was

at that time shipping over the Milwaukee Railroad (Tr. 279). The Milwaukee at that time was undoubtedly using the commercial scale in assessing freight charges on log shipment as was a justifiable inference from the evidence (Tr. 250, 261, 264, 265). He must have assumed in view of the fact that nothing was said about scaling practices and that he did not know of any Northern Pacific scale, that the commercial scale with which he was familiar would continue to be used and be the basis of refunds. Furthermore, as Mr. Frost testified, the Great Northern used the commercial scale for purposes of freight charges, and had been from 1920 on until tariff 51 was superseded (Tr. 261-264). This, of course, included the year 1926, the very period of time for which reparation was claimed here. Furthermore, as Mr. Irving testified (Tr. 279):

> "I attended the conference that led up to the Long-Woodworth agreement. I never authorized anyone to agree to a rate which would call for any other scale than the commercial scale. The Long-Woodworth agreement would have been unacceptable to me if any other scaling method than the commercial scale was to be used in connection with rates."

It is true, of course, that the refunds were on the basis of the carrier's scale, but apparently the other carriers who had used the commercial scale refunded on that basis; and the Northern Pacific, which un-

known to the Sauk River Lumber Company had not used the commercial scale, refunded on the basis of its scale. There would certainly have been no warrant in view of the evidence above set out for the court to have treated the Long-Woodworth agreement as constituting an agreement for the Northern Pacific scale to furnish the basis of an estoppel against a subsequently filed rate.

(2) Appellant next contends (on the assumption that the Northern Pacific scale was agreed to in the Long-Woodworth agreement), that the agreement is valid until set aside in a direct proceeding by the Department of Public Works and therefore constitutes a bar to this claim, assuming that the tariff means commercial scale. The cases cited clearly do not support this contention. No doubt the Long-Woodworth agreement was to this extent valid, that until a subsequently filed rate provided for terms other than that contained in the agreement, the agreement would be valid. Technically, it was a voidable agreement, subject to be voided by a subsequently filed tariff in accordance with the statutes of Washington. Even the authorities cited by appellant support this view of the law.

Thus, in *Armour Packing Co. v. United States,* 209 U. S. 56, 28 S. Ct. 428 (App. Br. 228), the court, in

holding that a prior contract with a carrier for a rate which was the legal published and filed rate when the contract was made, is no defense when the carrier has thereafter duly established a higher rate, since the statute it follows when the contract was made is read into the contract and becomes a part of it, and since the statute permits the filing of a rate thereafter by the carrier, the contract is ineffective to prevent it and its legal effect. The court said:

> "The contract, it is insisted, was at the legal published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate equally known by and available to every shipper . . . There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail in its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . . Nor do we find anything in the provisions of the statute inconsistent with this conclusion, in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law."

In *Seaman v. Minneapolis & R. R. Co.,* 149 N. W. (Minn.) 134, a carrier bought from a logging company a private logging railroad. As part of the consideration, the carrier agreed to transport the company's logs at a specified rate less than the tariff subsequently established. In holding the railroad not bound by the terms of the contract on the question of rates, the court said, p. 136:

> "The proposition that our rate legislation rendered these contracts inoperative we consider too clear to require further discussion or citation of authorities."

But appellant, while apparently recognizing this rule, suggests that the contract is not voided until held invalid in a direct proceeding before the Department, and that since no such proceeding has ever been brought, the contract is effective (App. Br. 240). In support of this position, he cites no case like that here involved arising under the laws of 1911. For example, cases cited dealing with telephone, water and power companies (App. Br. 236, 239), and the effect of the passage of the Public Service Commission Law of 1911 upon pre-existent contracts, is clearly inapplicable because Section 34 dealing with gas, electrical and water companies, and Section 43 dealing with telephone and telegraph companies specifically provide that the commission shall have power to direct by or-

der that existent contracts shall be terminated (Session Laws of '11, Ch. 117, pp. 561, 567). No such provision is found in the same act dealing with carriers.

The case of *Sultan R. & T. Co. v. Great Northern Railway Co.,* 58 Wash. 604 (cited App. Br. 233), was one in which the effect of the statutes of 1905 upon a pre-existent contract was involved. In holding that the contract was not abrogated by the passage of that statute, the court said, in distinguishing it from the *Armour Packing Co. v. United States* case (Br. p. 117), p. 619:

> "The contract was entered into before the passage of the Railway Commission Act and the amendments thereto, and there is nothing in the later acts tending to show that the legislature intended to abrogate previously existing valid contracts, conceding that it had the constitutional power to do so."

Furthermore, as recognized in *Northern Pacific Railway Co. v. St. Paul & Tacoma Lumber Co.,* 4 Fed. (2d) 359 (C. C. A. 9th) (cited App. br. 230-233), in refering to cases subsequent to the Sultan case, said:

> "If the cases cited are in conflict with *Sultan R. & T. Co. v. Great Northern Railway Co.,* 58 Wash. 604, the later decision must govern."

This statement was made in recognition of the rule that an existent freight contract must fall in the face of a subsequently filed freight tariff.

Furthermore, not a single case cited involves a reparation suit in which the Department of Public Works, having the pre-existent contract before it, has construed the tariff contrary to the claimed construction of the pre-existent contract. In this case, even assuming that a direct attack were necessary, it surely can be made in a reparation case. It would be useless to require a shipper to bring a proceeding for the purpose of directing cancellation of the contract and then bring a separate proceeding to recover reparation. There is nothing in the statutes of Washington which prevent both things being done in the same proceeding. That, in effect, was what was done by the Sauk River Lumber Company when it brought its reparation claim before the Department. The Long-Woodworth agreement was introduced in evidence before the Department and was the subject of a finding by the Department (Finding 14, Tr. 82). If the Department construed tariff 51 in a manner different from the Long-Woodworth agreement, the Department in effect held that the Long-Woodworth agreement was no longer binding.

The Long-Woodworth agreement being voidable, and having been voided either by the filing of tariff 51 or by the action of the Department as above mentioned, it is clear that no estoppel can be based upon

such an agreement. Having necessarily been made in view of the possibility that a subsequently filed rate tariff might render the rate provided for in the contract inoperative, there could be no justifiable reliance upon the contract as though it were not subject to change. That a void contract, under such circumstances, cannot be the basis of an estoppel seems clear. See *Melody v. Great Northern,* 127 N. W. (S. D.) 543. In that case a passenger accepted from a carrier's agent a ticket for interstate passage at a through rate, which under the rules of the Commission does not alllow stop-over privileges. The ticket did not show that stop-over privileges were not allowed. The passenger attempted to exercise the privilege and was ejected from the train. He brought suit, but it was held that he had no cause of action since persons dealing with interstate carriers are as effectually bound by the Interstate Commerce Act and the orders of the Commission as to both freight and passenger tariffs as the carrier itself. The court treated the contract under such circumstances as illegal and refused to apply the doctrine of estoppel against the carrier for the purpose of enforcing the contract. (See also Br. p. 103).

It is therefore submitted that there can be no

estoppel either under the undisputed facts or under the law.

What has been said should also dispose of contention (App. br. 240) that the Department's order of reparation violates the terms of the Long-Woodworth agreement, impairing the obligation of that contract. There is no evidence that the Departmental order construing the tariff as calling for a commercial scale construed it any differently than it would have construed the Long-Woodworth agreement itself under the evidence. Furthermore, since appellant itself concedes the right of the Department to abrogate the Long-Woodworth agreement in a direct proceeding, the contention must fail because that is in effect what the Department did at the hearing of the Sauk River Company's reparation claim.

The contention (App. br. 243), that if the Long-Woodworth agreement is invalid appellee is estopped to maintain the present action after receiving the refunds provided thereunder, overlooks the undisputed evidence that the question of scaling was not determined by the Long-Woodworth agreement, and that if determined at all, was more consistent with the determination in favor of the commercial scale than any other. Furthermore, the agreement was

voidable *not invalid* so that the estoppel principle cannot be invoked.

10. Appellant finally contends, (App. br. 247), that the findings are inadmissible and do not make a prima facie case so that the plaintiff's action must be dismissed.

This point has been discussed under assignment of error No. 4, and the argument there made is here applicable and need not be repeated. It should also be pointed out, however, that in addition to the findings, plaintiff introduced independent proof of all essential facts necessary to make out a cause of action (Tr. 235-287).

ANSWER TO No. 24.

(Tr. 121-122, 423; App. br. 125, 137)

Appellant objects to the refusal of the court to permit evidence of mill overrun as bearing on the meaning of tariff 51. Appellant claims that tariff 51 was not ambiguous. While it is difficult to see how this argument supports the assignment of error, the argument has heretofore been considered and need not be repeated. See Br. p. 78.

It may be well to recall that mill overrun results from the carrier's own Scribner Decimal "C" Scale,

and it cannot be a proper objection that it results from the shipper's use of the same scale. Furthermore, the law of the State of Washington as announced in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, holds that such evidence is immaterial. The law of the state on questions of the admissibility of evidence is controlling in a Federal Court under the Conformity Act. *Fisher Flour Mills v. United States,* 17 Fed. (2d) 232, (C. C. A. 9th).

ANSWER TO No. 25

(Tr. 136-143, 424; App. br. 159, 166, 181)

Appellant contends that its cost study showing the effect of freight charges under tariff 51 on the sufficiency of rates should have been admitted for the purpose of permitting a legal interpretation of tariff 51. Such evidence, it is argued, would have shown that the commercial scale would render the rates confiscatory and would have denied recovery to a shipper for excessive charges where the rates were less than reasonable. For answer to these contentions, see brief pages 91-93, 95, 97, 99, 104-109.

ANSWER TO No. 26.

(Tr. 170-172, 428; App. br. 192, 201)

Appellant contends the court erred in refusing to admit defendant's Exhibit "A" 22 for indentification, showing that the Department on January 28, 1929, dismissed on its own motion a complaint dated February 16, 1927, relating to the matter of scaling logs.

Despite the fact that this all occurred after the shipments in suit (1926), appellant contends that this evidence is admissible on the ground that unpublished scaling rules are binding, (App. br. 192), (For answer, see brief page 110), and need not be published under the administrative construction of the statute. (App. br. 200). For answer, see brief pages 110, 8, 88, 111, 127.

In any event, there is nothing in the mere fact of dismissal to prove administrative construction of anything. The Department might have thought that no rule as to scaling practices, commercial or otherwise, need be filed, because tariff 51 using the trade term "board measure" meant board measure commercial scale. Only the propriety of the highest conjecture would warrant the introduction of evidence so equivocal and so remote in character.

In any event, administrative construction cannot run contrary to the provisions of the statute requiring rules to be published. (R. R. S. 10350). Furthermore, if it is intended by introducing evidence of the administrative construction of the statute to alter the meaning of the term board measure, instead of applying the law of the state by interpeting that term in its commercial sense, it is now too late, since the law of the State of Washington governs and this evidence must be inadmissible.

ANSWER TO No. 27.

(Tr. 172-173, 429; App. br. 125)

Appellant contends that the court erred in refusing to admit in evidence the dictionary meaning of board measure. This is urged as erroneous on the ground that tariff 51 was not ambiguous. For answer, see brief page 78.

Furthermore, no evidence that the dictionary meaning had been used by the Northern Pacific itself nor by all the carrier parties to tariff 51 was offered. On the contrary, the evidence showed that the Northern Pacific made deductions for bark, burns, rotten sap, half the holes and breaks (Br. p. 4). The evidence later showed that other carrier parties to the tariff were not using the dictionary meaning.

Furthermore, the court and jury may take judicial notice of the common meaning of words without evidence. (23 C. J. 58, 124). The jury were especially advised of appellant's contention on this point in the court's instructions on the pleadings, wherein he said:

> The defendant " . . . alleges board measure in this case as a board 12 inches square and 1 inch thick, containing 144 cubic inches . . . "

Furthermore, board measure being a trade term, only a filed scaling rule showing a meaning other than its meaning commercially would have warranted the introduction of this evidence. (Br. p. 78).

Finally, the question is no longer open, in view of the law as announced in the Sauk River case.

ANSWER TO No. 28.

(Tr. 180-182, 430; App. br. 212, 216)

Appellant complains that the court improperly limited the purpose for which the jury could consider the Long-Woodwarth agreement as bearing on the meaning of board measure. Appellant contends the agreement is a bar in accordance with paragraph 12 of its answer. For answer to these contentions, see brief page 114.

In this connection, it should be pointed out that the court did not read paragraph 12 of the answer

to the jury, and appellant took no exception thereto. (Tr. 314, 325). Insofar as the Long-Woodworth agreement was offered in support of an issue not tendered to the jury and to which no exception was claimed, the point that the evidence was admissible under paragraph 12 has been waived.

ANSWER TO No. 29.

(Tr. 183-188, 431; App. br. 212)

Appellant contends that the court erred in refusing to admit evidence showing the history of litigation resulting in the Long-Woodworth agreement. Appellant contends that the evidence was material under its claim that that agreement is a bar to this action. For answer, see brief page 114.

Furthermore, the refusal to admit this evidence was not prejudicial, for substantially the same matter was later brought out in appellant's cross-examination of Mr. Berger (Tr. 271, line 7, to 272, line 2), and Mr. Woodworth (Tr. 183, 184 and Mr. Long, Tr. 200).

Furthermore, such evidence is immaterial as not proving the commercial meaning of board measure as the law of the state requires.

ANSWER TO No. 30.

(Tr. 192-194, 432; App. br. 137)

Appellant contends that Mr. Woodworth's testimony that the principle that the freight rate should be related to quantity or weight carried and that the commercial scale violates that principle should have been admitted. It is claimed that this evidence is admissible for the purpose of interpreting tariff 51 in a reasonable way. For answer, see brief page 19.

Furthermore:

(1). All the questions are leading.

(2). The interpretation of the tariff must be made in accordance with the law of the State of Washington, which adopts the commercial interpretation. The point urged is foreclosed except in a direct attack.

(3). No prejudicial error in any event occurs, for Mr. Woodworth was permitted to testify (Tr. 191):

> "The application of the commercial scale under tariff 51 would have resulted in further reducing the rates or reducing the freight paid from 5% to 10%. The greater the difference in the logs shipped the greater would have been the deduction in the railroad's compensation for the service."

Earlier he testified, (Tr. 191):

> "There would have been no settlement on behalf of the Northern Pacific had any such con-

> tention been advanced at that time as is now advanced in this litigation to the effect that the commercial scale was applicable."

(4) The proposed evidence was with respect to appellant only, though the tariff was *joint*.

ANSWER TO No. 31.

(Tr. 194-196, 434; App. br. 181)

Appellant argues that the trial court erred in rejecting evidence as to the reasonableness of freight rates under tariff 51 (only so far as Northern Pacific is concerned) on the theory that unless shown unreasonable there can be no reparation even if the carrier charged freight in excess of the filed tariff. (App. br. 181). For answer, see brief page 104.

ANSWER TO No. 32.

(Tr. 196-197, 435; App. br. 172)

Appellant contends that the evidence that the Northern Pacific fixed its rate with reference to its own scaling methods should have been admitted. The assignment of errors is argued in support of its position that the Long-Woodworth agreement is a bar to this suit. (App. br. 172). For answer, see brief page 114. Furthermore, there is no showing or offer to show that all the carriers fixed the rate in the

Long-Woodworth agreement or tariff 51 with reference to the Northern Pacific scaling method. One carrier cannot secure a special interpretation applicable to itself of a joint tariff different from the interpretation applicable to the other carriers.

Furthermore, insofar as this evidence has to do with interpretation, the law of the Supreme Court of Washington that the term "board measure" should be construed in its commercial sense is binding.

ANSWER TO No. 33.

(Tr. 199, 436; App. br. 212, 216)

Appellant contends the court erred in limiting the purpose for which evidence was admitted of refunds made under the Long-Woodworth agreement. Appellant argues that this evidence was admissible in support of the estoppel and counter-claim pleaded in paragraph 12 of its answer. (App. br. 212). For answer to the estoppel contention, see brief page 114.

Evidence in support of the counter-claim as well as the counter-claim itself, was properly rejected. This is a law action, and if appellant contends in this action that it is entitled to judgment against the Sauk River Lumber Company for the amount of refunds made pursuant to the Long-Woodworth agreement,

that contention must rest either (a), upon the theory of rescission or damages for breach of contract; or, (b), imposition of equitable conditions by a court of equity as a condition of granting relief.

Relief by rescission is not available, however, first, because there is no ground therefor. The only basis for the claimed rescission would be that the Sauk River Lumber Company has breached the Long-Woodworth agreement by suing to recover overcharges under tariff 51. But there is no breach, first, because there is no evidence that the Sauk River Lumber Company ever agreed to abide by the Northern Pacific scaling rules. The evidence is to the effect that there would have been no agreement had anything but the commercial scaling rules been accepted. (See brief page 8). Secondly, relief by rescission is no longed available because there has been full performance of the obligation of the parties thereunder on each side. *Cowley v. Northern Pacific Railway Co.*, 68 Wash. 558, holding that where a contract for annual passes in consideration of conveyance of property has become void by reason of the Commerce Act of 1887, and the contract has been substantially performed and the property is greatly increased in value, a court of equity will not decree a rescission

and restitution of the property, rescission resting upon discretion and not absolute right.

In *Southern Pacific R. Co. v. Frye & Bruhn,* 82 Wash. 9, there was involved an agreement between shipper and carrier to protect a freight rate. The carrier refunded to the shipper the sum in excess of the agreement required by the tariff. In holding that the carrier could not recover back the amount so paid, the court said, respecting the carrier's authorities:

> "We have examined with some care all the authorties cited by the appellant. They are to the effect that any shipping contract deviating from the legally published rate is void and cannot be made the basis of a defense in a suit to collect the legal rate. None of them holds that a party who has voluntarily paid money in the performance of such a contract can recover it after the contract has been fully executed by performance on both sides. Some of them clearly imply the contrary. . . "
>
> " . . . If we are precluded from passing upon the meaning of the appellant's published tariff, but must accept as final appellant's claim that the contract was illegal, then we hold that the contract having been fully executed, there can be no recovery for the money voluntarily paid by appellant thereunder."

Possibly appellant may claim that it is asking for damages for breach of contract rather than rescission, but there can be no breach of a contract not absolute in its terms, but subject to a condition subsequent,

namely, that its terms must yield to the provisions of a subsequently filed and different rate tariff. There is no breach to assert what the contract permits. The shipper is but asserting his right to the published tariff. To compel the shipper under such circumstances to pay a sum of money for the purpose of asserting the right given to him by statute is to permit the carrier to retain the consideration it received at the time of the agreement, and to recover back part of the consideration for the agreement as well.

Nor can this alleged counter-claim be treated as a method of permitting relief subject to the imposition of equitable conditions. There is no ground for equitable relief, and if that be true, a court of equity cannot on the one hand decline to take jurisdiction and at the same time impose equitable conditions, thereby exercising the same.

In *Blue Point Oyster Co. v. Haagenson,* 209 Fed. 278, Judge Cushman, in an action for specific performance, said, page 283:

> "Upon the hearing, the court was asked by complainant in the event that it should find that the complainant was not entitled to specific performance, to assess its damages. This will not be done, for to do so, after the conclusion reached, would be to refuse jurisdiction in equity and exercise it in the same case."

Certainly no authorities are cited by appellant in support of the position that it is entitled to a judgment for the refunds made. We believe that if the evidence of refunds was admissible at all, it was admissible only on the questions permitted by the court, namely, on the meaning of board measure, (since appellant claims that it made refunds on the basis of the Northern Pacific scale).

ANSWER TO No. 34.

(Tr. 201-206, 437; App. br. 146, 154, 192, 200, 218)

Appellant contends that the court erred in refusing to permit Mr. Cleveland to testify to the contents of all tariffs filed before tariff 29. It was contended that the contents of the preceding Northern Pacific tariffs would prove practical construction of the Washington statutes showing that scaling rules need not be filed and that the Northern Pacific scaling rule was proper (App. Br. 146). For answer, see Br. pages 22, 110).

This evidence is immaterial because it doesn't prove what the commercial meaning of board measure is.

It should also be pointed out that tariff 51 was in effect only since 1925 (Tr. 212). The court had permitted the appellant to prove that after its tariff 398L was attacked, it and other carriers had filed joint tariff 29 in 1922, which was immediately sus-

pended. The history of the matter in connection with this was testified to by Mr. Berger (Tr. 271) and by Mr. Cleveland (Tr. 206). The next tariff filed was tariff 51. There was no attempt to prove nor any offer to show administrative construction of any but the Northern Pacific tariffs prior to tariff 29, but such a special administrative construction applicable to one of four carriers filing a joint tariff would as has previously been shown, been inadmissible. (See Br. pp. 99, 110).

In addition to the matters heretofore argued, it should be pointed out that tariffs prior to 1911 would certainly have been inadmissible for the reason that the statutes at that time were different from the Public Service Commission law passed in 1911.

Appellant argues this assignment also under the heading that an unpublished scaling rule is binding, (App. Br. 192), (For answer, see Br. pages 22, 110), and that scaling rules need not be published under administrative construction of the statute. (For answer see Br. page 22).

ANSWER TO No. 35.

(Tr. 210-212, 440; App. Br. 212, 216)

Appellant contends that the court erred in limiting the purpose of receiving tariff 29 solely as an aid to

construing the meaning of the term "Board measure." It is claimed that it was admissible on the issue of estoppel by the Long-Woodworth agreement or counter-claim. (App. br. 212). For answer see br. page 114, 132.

Furthermore, insofar as estoppel and counter-claim is concerned, there is nothing in the court's instruction limiting the use of the evidence concerning tariff 29 to the construction of board measure in tariff 51. The jury might, under the terms of the court's instruction, have used tariff 29 for the purpose of determining the meaning of "board measure" in the Long-Woodworth agreement, in aid of the defendant's theory as to estoppel and counter-claim. In that respect too, the assignment is not well taken.

ANSWER TO No. 36.

(Tr. 215-220, 440; App. br. 336)

Appellant contends that the court erred in refusing to admit defendant's Exhibit "A" 29, being findings and order and tariff dated June 5, 1934, May 15, 1934, and January 25, 1935, dealing with the hauling of logs on "for hire carriers" as distinguished from railway carriers. It is claimed that the exhibit should have been received as evidence as the departmental con-

struction of the term "board measure". (App. br. 336).

The evidence was clearly inadmissible:

1. The question of construction, other than in the commercial sense, is no longer an open question in this case.

2. The findings are hearsay, since this exhibit is not the basis of a suit to recover reparation allowed.

3. The tariffs do not relate to railroad carriers.

4. The so-called construction does not relate to tariff 51.

5. The Exhibits do not use the term "board measure".

6. The Exhibits were promulgated nearly ten years after tariff 51 went into effect, and there was no offer to show that conditions remained the same so as to make a so-called departmental construction under the same conditions applicable to tariff 51.

ANSWER TO No. 37.

(Tr. 220-223, 446; App. br. 159, 167, 181)

Appellant contends that the findings and order dated June 5, 1931, setting aside rates on saw logs for measurement should have been admitted. It is claimed

that this evidence was necessary as bearing on the legal interpretation of tariff 51 (App. br. 159, For answer see br. 20); as bearing on the confiscatory character of the department's interpretation (App. br. 166, for answer, see br. 20) and as showing the unreasonable character of rates under tariff 51 for the purpose of precluding an overcharge claim (App. br. 181, for answer see br. page 21). The evidence was also inadmissible:

1. The Exhibit contains hearsay statements.

2. It does not relate to the year 1926, or to tariff 51.

3. It relates to the year 1931. Whether car load rates in 1931 were reasonable or unreasonable is certainly no evidence of reasonableness of the board measure rates in 1926.

ANSWER TO No. 38.

(Tr. 223-227, 449; App. br. 159, 166, 181)

Appellant contends that the court erred in refusing to admit defendant's Exhibit "A" 16, being a study of comparative earnings on log traffic and on eight other commodities moving in volume in western Washington. It is claimed that this evidence was admissible for the purpose of showing that the Department's construction of the tariff is illegal (App. br. 159. For

answer, see brief page 20), confiscatory, (App. br. 166, For answer, see brief page 20), and for the purpose of showing that shipper was not damaged because the rates were not unreasonable. (App. br. 181. For answer, see brief 21).

As has been pointed out, the question of the sufficiency of rates is immaterial in this proceeding. Furthermore, the evidence was not coupled with an offer to show similar data as applicable to the other carrier parties to tariff 51. Nor does it prove the commercial meaning of board measure.

ANEWER TO No. 39.

(Tr. 227-229, 453; App. br. 181)

Appellant contends that the court erred in refusing to permit Mr. Cleveland to testify that the rates collected were less than reasonable in support of its position that unless it is shown that the rates charged were unreasonable, reparation cannot be recovered. (App. br. 181. For answer, see brief page 21).

Furthermore, this offer was not coupled with an offer to show the same matters as to the other carrier parties to tariff 51. Nor does it prove the commercial meaning of board measure.

ANSWER TO No. 40.

(Tr. 234, 287-288, 454; App. br. 212, 216, 347)

Appellant contends that the court erred in striking the counter-claim and plea of estoppel, (Par. 12 of answer), and rejecting all evidence in support thereof. (App. br. 212, 216, 347. For answer, see brief 24).

It should be again pointed out that the only thing stricken prior to the court's instruction was the counter-claim, and to that an exception was saved, (Tr. 234); but on the question of estoppel, paragraph 12 of the answer was not submitted as an issue to the jury in the court's statement of the issues, but no exception was saved to the action of the court in not doing so. In another assignment of errors, to the refusal of the court to give a proffered instruction dealing with estoppel, an exception was saved, and that matter will be argued when we come to that assignment. No evidence in support of a claimed estoppel was rejected. On the contrary, the evidence was all admitted, limited it is true, however, to use for the purpose of determining board measure. That matter has already been considered. (See answer to assignment of error 33).

Appellant states (App. br. 348), that Judge Neterer decided that the defense of estoppel and counter-

claim was good, because Judge Neterer overruled appellee's motion to strike paragraph 12 from the answer. (Tr. 57). The ground of the court's refusal does not appear. The motion was argued by former counsel in this case. What the nature of the argument was or what the reason for the court's action was we do not know, nor does it appear from the record. We are, therefore, not disposed to accept appellant's interpretation of Judge Neterer's ruling.

ANSWER TO No. 41

(Tr. 250-262, 454; App. br. 301)

No. 42

(Tr. 260-261, 455; App. br. 302)

No. 43

(Tr. 262, 456; App. br. 301)

No. 44

(Tr. 265, 457; App. br. 301)

No. 45

(Tr. 284-285, 457; App. br. 301)

No. 47

(Tr. 280-281, 458; App. br. 309)

No. 50

(Tr. 291-295, 298-301, 462; App. br. 302)

No. 52
(Tr. 303-307, 468; App. br. 303)

No. 118
(Tr. 374-375, 531; App. br. 304)

The foregoing assignments present one question, namely: Whether the court committed error in permitting the introduction of evidence to the effect that the Great Northern and the Chicago, Milwaukee railways parties to tariff 51 used the commercial method of scaling before and after the Long-Woodworth agreement and tariff 51.

Appellant argues that evidence of scaling practices was remote and immaterial because different tariffs were involved. It will be recalled that plaintiff's case in chief consisted of findings and order of the Department, testimony as to reasonableness of attorneys fees, and testimony as to the dates when freight charges were paid. The appellant's answering case consisted of voluminous testimony, purporting to rebut plaintiff's case. Among other things, the appellant introduced the Long-Woodworth agreement and evidence of the negotiations out of which it emerged. It offered the testimony both of Mr. Long and Mr. Woodworth. Appellant also introduced evidence of its scaling practices since 1906. (Tr. 108, 120, 162,

163). Among other things Mr. Long testified concerning the Long-Woodworth Agreement (Tr. 200, 201):

> "The memorandum of agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling. There was to be no change. I think the theory of this was that the scaling method was settled and uniformly applicable to all the railroads."

Appellee in rebuttal sought to explain what Mr. Long meant by his testimony concerning the practice of the shippers in the past "in the way of scaling," and as to scaling methods that "was settled and uniformly applicable to all the railroads." Mr. Frost's and Mr. Barrett's testimony showed the past log scaling practices of the Chicago, Milwaukee and Great Northern in the Puget Sound region just as the Northern Pacific had been permitted to testify to the scaling practices of the Northen Pacific in the Puget Sound region in the past. It will also be remembered that the Milwaukee and Great Northern and the Northern Pacific were all parties to the Long-Woodworth agreement and to tariffs 29 and 51. The trial court rightly ruled, therefore, that the scaling practices of these other carriers were properly considered in view of Mr. Long's testimony introduced by appellant itself. (Tr. 260). Obviously the practices of the other carriers under tariff 51 and their understanding of

what board measure meant in the Long-Woodworth agreement, would, even on appellant's own theory of the conduct and understanding of the parties as bearing upon the interpretation of an ambiguous term have been clearly material. Furthermore such testimony rebutted the appellant's evidence and inference from evidence of uniform practical construction and the claimed unambiguous meaning of board measure. That rebuttal testimony is largely in the discretion of the trial court reviewable only for abuse of such discretion, see *Kelley v. Department of Labor & Industries,* 172 Wash. 525, 529. Here the discretion was properly exercised.

Appellant contends, however, that the testimony was immaterial because the scaling methods of the Great Northern and Milwaukee railways were methods used under different tariffs than those filed by the Northern Pacific. It cites authorities to the effect that every railway may set up its individual tariff on any basis it chooses, even though its competitors use a different basis (App. br. 306), overlooking the fact that there is here involved a joint tariff meaning the same for all carriers. But in any event, the question whether the scaling practices of the Milwaukee and Great Northern, were warranted by their respective tariffs, was not the question. Mr. Long did not testify

that the *warranted* scaling practices were to continue. He testified that the scaling practices were to continue and that he thought them uniformly applicable to all railroads.

But if there was any prejudice in showing the shippers' practices as distinguished from the shippers' warranted past practices, appellant was accorded full opportunity to explain or to contradict such evidence or evidence as to the scaling practices of the other carrier parties to the tariff or to the agreement, both by offering in evidence the tariffs of those carriers and by offering testimony as to their scaling practices. The court reminded the appellant (Tr. 257, 258), after explaining his reasons for permitting appellee to introduce evidence of the scaling practices of the other carriers: "For that reason the court feels that this offered testimony is proper rebuttal testimony, and the court again advises both parties that a reasonable opportunity will be given the defendant to produce surrebuttal within a reasonable scope on that point." He had earlier stated (Tr. 254): "A reasonable opportunity will be given the defendant to put on rebuttal touching this point." He again reminded appellant (Tr. 285): " . . and the defendant is again advised that surrebuttal within reasonable scope on that question objected to in respect to the

testimony of those witnesses may be produced by the defendant,''—referring to Mr. Barrett's and Mr. Frost's testimony.

Appellant, however, failed to introduce any evidence or testimony, either to explain or to contradict that of Mr. Frost and Mr. Barrett.

Its failure so to do especially emphasized the fact that the testimony of the Milwaukee scaling practices from 1913 to 1919, and 1920 to 1922, could scarcely be said to be remote, especially when the Northern Pacific testimony as to scaling practices went back to 1906. Appellee had the right to rely upon the presumption that the Milwaukee scaling practices continued, a presumption that the appellant could easily have overcome if the facts were contrary. Especially was that tesimony proper when it was coupled up with evidence that the Great Northern scaling practices according to the commercial method was the same before the Long-Woodworth agreement as after it and after tariff 51 was filed.

But one assignment of error needs an additional observation. Appellant's assignment of error 118 is based upon the refusal of the court to adopt appellant's proposed instruction to the effect that the Northern Pacific wasn't bound by the scaling prac-

tices of the other carriers. Such an instruction without an indication that the Northern Pacific might be affected as bearing upon the meaning of the term "board measure" was clearly erroneous and misleading. The most that appellant would be entitled to and that appellant received was the following instruction given by the court to the jury (Tr. 261):

> "The jury will understand that the mere fact that some other railroad may have used a different method, may not of itself conclusively prove that the Northern Pacific is liable for damages in this case, but the jury will receive this evidence only for the limited purpose that the court stated it could receive it for, namely, in connection with the question, what is the proper method of board measure, and what was the proper method of scaling logs for the purposes involved in this suit."

It is submitted that none of the foregoing assignments of error are well taken.

ANSWER TO No. 46

(Tr. 274, 458; App. br. 201)

Appellant contends that a question asked Mr. Berger on cross examination as to what happened to the suit of the Department against the carriers in 1920 should have been permitted for the purpose of securing an answer in aid of the proposition that scaling rules need not be published under the administrative

construction of the Washington statute. (For answer see brief page 22).

Furthermore, it should be pointed out:

1. An answer to that question would not necessarily prove administrative construction.

2. Evidence had already been introduced as to what happened, namely the reversal of the department's action by the Supreme Court of the United States.

3. There was no offer to show what the answer to the question would be so that the objection is not properly saved.

ANSWER TO No. 48

(Tr. 281-282, 458; App. br. 349)

Appellant contends that the court erred in permitting Mr. Irving to testify on direct examination whether the same facts were developed before the Department as had been developed at the trial. (App. br. 349). It is claimed (without citation of authority) that the question asked of him called for an inadmissible conclusion. (App. br. 349).

The only case we have found bearing on the question holds to the contrary. *State v. Maxwell,* 1 N. W. (Iowa) 666. In that case defendant was charged with assault and battery. He pleaded not guilty, and former

conviction for the same offense. The state introduced evidence tending to prove the crime charged. The defendant offered as a witness a Justice of the Peace, whose docket was admitted tending to show former conviction for the same offense. The information filed before the Justice of the Peace was also admitted. The defendant then asked the witness "whether the offense which is charged in that information is the same one that has been testified here today by these witnesses?" and also "whether or not the evidence was the same". The trial court sustained objections to these questions. The Supreme Court, in reversing the case for the action of the trial court in this respect, said:

> "The object of the proposed evidence was to show the identity of the two offenses, and it should have been admitted.
>
> "The Attorney General insists that the mere opinion of the witness was sought, and that what the witnesses testified to before the justice was immaterial, or rather incompetent. But we think if the witnesses were the same, and they described a certain transaction, any one who heard them on both occasions could properly state such facts. Such evidence would tend to prove the identity of the two offenses. It was not admissible for any other purpose. Properly speaking, it was not an opinion the witness was asked to communicate, but a fact that occurred in his presence."

This case is but an application of the general rule stated in 22 C. J. 531:

> "The rule . . . is that where numerous impressions of a more primary order are blended into a composite fact of more complex but still inevitably recognizable nature, and it is practically impossible to reproduce or adequately describe to the jury the primary facts on which the witness' inference as to the existence of the ultimate fact is based, the ultimate fact may be stated."

22 C. J. 597:

> "A witness who is shown to be possessed of adequate knowledge and the capacity to apply it, may state his inference on a question of identity, whether the inquiry relates to the identity of human beings, of animals, of inanimate things, or even of occurrences."

In this case the witness was thoroughly cross examined (Tr. 282). The appellant had shown in its case in chief what the pleadings were before the Department. (Pl. Ex. A20, A21; Tr. 164, 167).

Appellant, though it did not choose to, could have offered in evidence the record before the Department to contradict the testimony of Mr. Irving. The appellant did, however, offer in evidence a list of witnesses, (Pl. Ex. A22; Tr. 285) that testified before the Department, from which the jury could determine whether the witnesses and the evidence were the same. Furthermore, the court instructed the jury that it

need not believe the findings in face of contrary credible evidence in the case, stating, (Tr. 318):

> "In considering the findings of the Department, you have a right to consider the fact, if it be a fact, that new or additional evidence has been introduced before you which was not before the Department."

Under all these circumstances, the question of the admission in evidence of Mr. Irving's answer to the question was largely within the discretion of the trial court reviewable only for abuse (See 22 C. J. 514; *State v. Bolen,* 142 Wash. 653, 664). It is submitted that there was no abuse of discretion and that the question was proper.

ANSWER TO No. 49

(Tr. 290-291, 296-301, 459; App. br. 322)

Appellant contends that the court erred in denying defendant's motion that the jury be instructed to disregard the opening argument of counsel for plaintiff concerning the decision of the Supreme Court of Washington. Appellant contends that the decision was not in evidence before the jury, and should not have been considered by them for any purpose. (App. br. 327). We contend:

1. That the action of the Supreme Court in affirming the award was before the jury.

2. It was perfectly proper to refer to the action of the Supreme Court in affirming the Departmental findings and order as an argument in favor of appellee's contention that the jury should decide for the plaintiff.

3. The error, if any, was harmless.

1. The fact that the Supreme Court had reversed the action of the Superior Court and reinstated the findings and the order of the Department was before the jury. Plaintiff instituted suit while the Superior Court had set aside the findings and order of the Department and an appeal was pending before the Supreme Court of Washington. In its supplemental complaint, appellee pleaded the action of the Supreme Court in paragraphs 7 and 8 of the complaint. (Tr. 44, 45). Appellant, in paragraph 6 of its answer to the complaint (Tr. 24), and in its answer to the supplemental complaint (Tr. 54) admitted the whole of paragraph 8 of the supplemental complaint. That paragraph reads as follows:

> "That thereafter this plaintiff and the said Department, not being satisfied with the judgment in said review proceedings and being aggrieved thereby, appealed from the judgment of said Superior Court to the Supreme Court of the State of Washington; upon the hearing of said appeal upon the merits, said Supreme Court reversed the judgment appealed from and re-

> manded said case to the said Superior Court with direction to enter judgment sustaining the said order of the Department. A copy of said decision of the Supreme Court is attached hereto, marked Exhibit "B" and by this reference made a part hereof. That thereafter said Superior Court, pursuant to the direction aforesaid, made and entered a judgment upon remittitur herein, a copy of which judgment, save the decision of the Supreme Court (attached to this pleading as Exhibit "B") is attached hereto, marked Exhibit "C" and by this reference made a part hereof."

The appellee had a right to rely on matters admitted in the pleadings without further proof of the same. (62 C. J. 112). Indeed, the exclusion of competent evidence to prove an admitted fact would not have been erroneous.

> *Schwede v. Hemrich,* 29 Wash. 124;
> *Johnson v. Anderson,* 61 Wash. 100.

Accordingly, appellee made no effort to introduce the decision in support of its complaint or in its rebuttal testimony, except that, out of a superabundance of caution, it offered a copy of the decision in evidence not in support of its complaint but in support only of the matters pleaded in its affirmative reply. This was done in the absence of the jury. It will be remembered that under the pleading and practice of Washington, there is no pleading beyond the reply, and all affirmative matters in the reply

are deemed denied. (R. R. S. 297). This view of the matter clearly appears from the bill of exceptions (Tr. 286), which states:

> "THE COURT: (in absence of jury). The admission of plaintiff's Exhibit 22 is denied, it *being understood that the Supreme Court's affirmance of the Department's findings is not disputed as to the matter of fact admitted in the pleadings,* which makes it unnecessary to admit it for any purpose connected with that matter, (*referring to affirmative reply*)." (Italics ours).

That the trial court understood the fact of affirmance of the Departmental findings and order to be before the jury in the form of a fact admitted by the pleadings is indicated not alone by the court's refusal to instruct the jury to disregard reference by appellee's counsel to the action of the Supreme Court, (the same ground therefore being urged below), but also because the court's instructions to the jury on the pleadings called attention to the fact that the action of the Supreme Court was admitted by appellant. (Tr. 313, 314).

Appellant made no motion to strike such admission from the pleadings, nor did appellant take any exception to the action of the trial court in calling the jury's attention to the admission in appellant's answer of the facts alleged concerning the decision of the Supreme Court of Washington. Appellant's state-

ment, therefore, (page 321), that the decision of the Supreme Court, although offered by appellee, was not admitted in evidence, is clearly misleading.

2. Reference to the effect of the Supreme Court's decision.

Appellant argues that because the merits of plaintiff's claim were not decided by the Supreme Court of Washington, that therefore it was improper to refer to that decision at all in argument to the jury. (App. br. 320, 326).

We have elsewhere pointed out (Br. 17, 23, 60), that the effect of the Supreme Court's action in reinstating the findings and award was a judicial holding that the evidence and record before the department warranted the department in making the findngs and order that it did. That being the legal effect of the decision, it was entirely proper for appellee's counsel to call attention to the action of the Supreme Court, as persuasive evidence that appellee's interpretation of the tariff and the correctness of the findings was right. Nowhere was it argued that the jury should deem itself to be concluded by that action. It was argued merely that they should be persuaded by that action. Even if it could be inferred from the argument that the jury would have to deem themselves concluded by

that action, the court's instructions following argument of counsel for both sides clearly dissipated any such inference. The court instructed on the question of burden of proof. The court instructed on the question of the findings and order of the Department as prima facie evidence of the facts therein stated. The court instructed upon what effect to give to new or additional evidence, and the court specifically instructed (Tr. 317):

> "You will note that it is 'the facts therein stated,' *not the liability of the defendant* of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor statements, comments, or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. Yo are not to consider anything contained in those findings and order except the facts therein stated. It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instructions." (Italics ours).

It was not incumbent on the trial court to correct the error, if any, in the argument of counsel by motion to instruct the jury to disregard portions thereof. The court, in the exercise of its discretion, might well have awaited the time to instruct the jury properly when it gave its instructions to the jury.

It is to be remembered, as stated in 64 C. J. 267, "counsel should not be subjected to unreasonable restraint in commenting on evidence, but should be allowed a wide latitude, this being a matter for the sound discretion of the trial judge. Thus as a general proposition he may discuss such facts as are in evidence without limit or restriction, but he may not urge the jury to predicate their verdict on what they know outside of the evidence."

In 64 C. J. 249, it is stated:

> "Counsel has great latitude in argument, subject, however, to the regulation of, and control by, the court, whose duty it is to confine arguments within proper bounds. However, the logical propriety of counsel's argument is not a matter for the court's concern. Thus counsel may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the evidence . . . Mere exaggeration is not necessarily improper, and if the evidence warrants it, he may make vituperative remarks and use inflammatory language."

There is certainly no abuse of discretion in this case.

3. No legal prejudice.

As has heretofore been pointed out, the action of the Supreme Court in announcing the law of Washington to the effect that an ambiguous term in a tariff

must be construed in its commercial sense is binding upon the trial court. Even, therefore, if it can be said that counsel argued the binding character of the decision of the Supreme Court of Washington, or argued any other legal proposition that was correct in fact, no prejudicial error could be claimed on that account.

In *Gallagher v. Town of Buckley,* 31 Wash. 380, it was held that the fact that plaintiff's counsel in a personal injury case read to the jury an opinion of the Supreme Court in a similar case will not be regarded as prejudicial error when the opinion read was in accord with the law as given by the court to the jury, and when there is nothing to show that the jury may have been misled or the defendant in any way prejudiced thereby. As the court said:

> p. 386. "The jury were carefully instructed that they must look alone to the evidence in this case as the basis of any verdict they should find. We shall presume they did so, under the record."

It is respectfully submitted that the authorities cited in appellant's brief 327 to 330 are not in point because of the court's instructions, and that the assignment as a whole is not well taken.

ANSWER TO No. 51

(Tr. 301-303, 305-307, 466; App. br. 322)

Appellant contends that the court erred in denying its motion to instruct the jury to disregard the opening argument of counsel commenting on the scaling practices of other carriers (Tr. 462). The comment was strictly according to the testimony of Mr. Frost and Mr. Barrett admitted in evidence, and was directed to what was meant by board measure under the Long-Woodworth agreement and tariff 51, and the significance of appellant's failure to introduce rebutting testimony as to carriers' practices. As to the latter point the rule is stated, 64 C. J. 269:

> "But he may comment on the absence of evidence which is in the possession of the opposite party which should naturally be introduced; . . "

It was clearly proper for appellee's counsel to point out the absurdity of appellant's position that board measure should mean Northern Pacific scale for the Northern Pacific, while the other carriers construed it to mean commercial scale, all carriers being parties to the same agreement and tariff. This point need not be discussed further. (See brief page 23).

Furthermore, since the rule that an ambiguous term in a tariff should be construed in its commercial sense is the law of the State of Washington, and since

this objection is based on the proposition that the commercial scale is not the proper method of interpretation, this claimed error is not prejudicial.

ANSWER TO No. 53

(Tr. 317-318. 325-326, 471; App. br. 256, 313)

Appellant contends that the court's instructions on the meaning of prima facie evidence were improper since the court permitted the findings and order to be weighed by the jury as evidence. It is appellant's position that the findings and order amount to nothing more than a presumption of law operating to shift the burden of going forward with the evidence and depriving the findings of all efficacy after credible rebutting evidence has been introduced. We contend:

1. That the findngs may be weighed as evidence under the limitations placed upon them by the court.

2. That even if they may not be, there was no prejudicial error, since the instructions do not necessarily mean that the findings may be weighed even as against opposing credible evidence.

1. Apellant seeks to give the findings and order no greater force than a common law presumption of law. Such presumptions do not, of course, arise as a result of findings subject to judicial review after a

hearing had. Such presumptions rest on common experience and inherent probability. Such presumptions are, for example, the presumption of sanity, the presumption of due care, the presumption against suicide, the presumption of ownership resulting from possession, and presumptions of that character. It is true that such common law presumptions, according to many decisions, may not be weighed as evidence in the face of credible evidence admitted to rebut such presumptions. The rule of cases of that kind is the rule relied on by apellant. But even as to such common law presumptions, there are authorities to the effect that such presumptions prevail unless rebutted by credible evidence. Whether the presumption of due care or sanity or ownership is to be believed by the jury as a proper inference of fact is determined by the quality of the testimony offered to rebut it. If the jury does not choose to believe that testimony, it will treat the presumption as the fact.

Karp v. Herder, 81 Wash. Dec. 511;

Mutual Life Insurance Co. v. Maddox, 128 So. (Ala.) 383;

New York Life Insurance Co. v. Beason, 155 So. (Ala.) 530;

Eisenman v. Austen, 169 Atl. (Me.) 162;

Maxey v. Railey & Bros. Banking Co., 57 S. W. (2d) (Mo.) 1091.

In California common law presumptions may be weighed against rebutting testimony because the statute so directs.

Pitt v. Southern Pacific Co., 9 Pac. (2d) 273.

In fact, the statute treats such presumptions as inferences of fact, (i. e. presumptions of fact) to be weighed along with other facts by the jury.

Bushnell v. Yoshika Tashiro, 2 Pac. (2d) 550.

In *Karp v. Herder,* supra, plaintiff brought an action for wrongful death, the plaintiff pleading contributory negligence. The court instructed the jury, among other things, that it was the deceased's duty to yield the right of way to defendant, and then added:

> "The law presumes that at the time and place in question, and at this intersection, the deceased did yield the right of way to the defendant. This, however, is merely a presumption and may be overcome by the evidence in this case to the contrary if there is such evidence, but it continues as a presumption until it has been overcome by the evidence in the case."

It was contended that this instruction was erroneous because there had been positive testimony to the effect that the deceased did not yield the right of way to the defendant. The court recognized that,—

> "In many jurisdictions the presumtion of due care on the part of a deceased person falls and

> loses its force completely upon the introduction of positive evidence to the contrary."

The court also recognized that,—

> "Language may be found in many of our own cases from which it might be inferred that such is the rule in this jurisdiction. . . . "

The court then called attention to the rule in other jurisdictions that the presumption may be strong enough to overcome the testimony of a witness, (i. e., that it may be weighed against such testimony), and then held from a consideration of other cases in this jurisdiction, that the instruction was proper and that it was for the jury to determine whether to give effect to the presumption or to believe the rebutting testimony.

Also we are not dealing here with a common law presumption, we are dealing with the statute that makes the findings and order of the department "prima facie evidence of the facts therein stated". It may be true that for purposes of determining whether such a rule deprives a party of a right to jury trial or constitutes due process, it constitutes in effect a rebuttal presumption (whether of law or fact is not stated). Indeed, that is all that the cases cited by appellant hold. (e. g. Appellant's brief 272, 273). But no case cited by appellant purports to state

that the findings and order of the commission under the I. C. C. must be given the same effect as the common law presumption of law which may not be weighed as evidence. On the contrary, the very fact that the Washington statute states that the findings and order shall be prima facie evidence of the facts stated as distinguished from a statement that the findings and order shall constitute a presumption that the defendant is liable in the amount awarded, may well indicate a purpose to treat such findings and order different from the treatment of an ordinary presumption of law.

The distinction between common law and statutory presumption is clearly pointed out in *O'Dea v. Amodeo,* 170 Atl. (Conn.) 486. The statute there provided that "proof that the operator of a motor vehicle was the husband, wife, father, mother, son, or daughter of the owner shall raise a presumption that such motor vehicle was being operated as a family car within the scope of a general authority from the owner, and shall impose upon the defendant the burden of rebutting such presumption."

In an action for personal injuries involving this statute, the court said:

> "The contention of the defendant . . . is that the effect of this statute is merely to carry the

case to the jury and justifies a conclusion that an automobile is a family car when no substantial evidence is offered by the defendant that it was not, but that, as soon as substantial evidence to that effect is offered, the statute ceases to have any effect and the plaintiff then has the burden of proving that the car was a family car just as though no statute existed."

The court then considered the various common law presumptions, and then said:

p. 488. "A presumption established by statute may fall into one or the other of these categories, or the language used may clearly indicate the effect which it is intended to have. . . "

"Our question is: What did the legislature intend by this provision? If in this instance the intent of the legislature was to do no more than to establish a presumption which would be rebutted by the producton of substantial countervailing evidence, the last provision in the statute would serve no purpose, and we must assume that by its inclusion the legislature intended some further effect. . . "

"To construe the statute as meaning that the presumption would be rebutted as soon as substantial countervailing evidence was offered would necessarily mean that, when the defendant had offered such evidence, the presumption would not only cease to operate; but the burden of proof would be upon the plaintiff unaided by inferences from the facts which gave rise to the presumption, and in the absence of sufficient evidence to sustain that burden the defendant must prevail, even though the trier entirely disbelieved the testimony offered by the defendant. . ."

"We conclude that the intent of the statute is

> that the presumption shall avail the plaintiff until such time as the trier finds proven the circumstances of the situation with reference to the use made of the car and the authority of the person operating it to drive it, leaving the burden then upon the plantiff to establish, in view of the facts so found, that the car was being operated at the time as a family car. From this it would follow that if the plaintiff offered no evidence upon the issue and the trier disbelieved the testimony offered by the defendant for the purpose of showing the circumstances of operation to have been such that it was not a family car, the plaintiff would be entitled to recovery."

What then was the legislative intent as to how the findings and order should be regarded by the trier of the facts? We are not here dealing with a mere common law presumption, nor are we dealing with a statute which uses the term presumption at all. We are dealing with something which the statute makes evidence. Prima facie, it is true, but still evidence. Not only does the statute make it evidence, but it does so only after such evidence has been arrived at after a hearing before a body acting in a judicial capacity, subject to review by the Superior and Supreme Courts of the State of Washington acting in judicial capacity for the purpose of determining whether the evidence before the Department warranted the making of findings and warranted the making of the order which rests upon such findings.

Is it to be seriously argued that prima facie evidence, under such circumstances, was intended by the legislature to have no greater force and effect than would be given to an ordinary common law presumption of law which arises not after a hearing and not after judicial review, but arises solely from human experience and inherent probability. Certainly no case cited by appellant requires such an interpretation.

But appellant claims that if the findings are permitted to be weighed as against contrary evidence, there would be a denial of due process, citing no authority to that effect. But in view of the fact that the carrier is permitted to attack the findings and order by introducing rebutting evidence so as to present its own version of the facts, which facts must be considered in the light of the trial court's instructions on the law, there would seem to be no basis for such a contention. Similar reasoning has resulted in a rejection of a similar contention as to the similar provision under the I.C.C. *Meeker v. Lehigh Valley Railroad Co.,* 236 U. S. 412, 35 S. C. R. 328, 59 L. Ed. 644. So long as the findings and order are given the effect of prima facie evidence of the facts stated, and so long as such effect cannot be claimed until after the findngs have been made after hearing and subject to judicial review, it can scarcely be claimed that

to permit such evidence to be weighed is so arbitrary as to constitute a denial of due process. There is nothing arbitrary about findings so carefully hedged about.

But appellant then claims that under section 635 of the judicial code, which reads:

> "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

that the findings and order cannot be weighed as evidence. (App. br. 281). In the first place, that section deals only with the question of "mode of proof," that is, the procedure of taking testimony. It does not purport to deal with the question of the effect to be given to testimony properly admitted. This is especially evident from the fact that the cases cited by appellant construing the statute deal with the examination of a party before trial, interrogatories, and the production of books and writings before trial. (App. br. 281). Furthermore, the subsequent sections of the judicial code following with exceptions, deal with matters such as depositions and the like.

Indeed, if appellant's argument were sound, the findings and order of the Department would be inad-

missible even as prima facie evidence, since such findings are neither "oral testimony" nor the result of the "examination of witnesses in open court". The error of appellant's argument is easily exposed by reason of the fact that it proves too much.

2. Error, if any, not prejudicial. Appellant's claim of error is predicated on the proposition that the court's instruction means that the findings and order may be weighed as evidence in face of countervailing evidence. This conclusion is said to result from the following instruction:

> "Prima facie evidence is evidence which standing alone and unexplained would maintain the proposition and warrant the conclusions to support which it is introduced. Such evidence once in a case stands there all through the trial unless stricken out by the court, and should be given such weight and only such weight as the jury thinks it is entitled to in connection with all the other evidence in the case."

While it is true that this instruction may possibly mean that the findings and order may be weighed, that is not a inevitable conclusion. The instruction may mean that until the prima facie evidence is rebutted by credible testimony, it stands. Hence the presumption as to the facts found continues all through the trial until facts or parts of facts are rebutted. In that sense, the presumption is given

weight if there is no countervailing evidence and the presumption is also given weight if the countervailing evidence is not credible. This interpretation is undoubtedly what the court meant, for it later stated:

> "Prima facie evidence may, *if believed by the jury*, properly justify, although it does not compel, the conclusion in support of which it is offered. . . "

> "Such facts in evidence may be considered by the jury as successfully overcome and rebutted if, and only if, the jury believes from other credible evidence in the case that such facts and evidence are not consistent with the truth, or should be given less weight than such other credible evidence."

The trial court adopted appellant's view that countervailing evidence must be credible. (App. br. 317). It must necessarily follow that if the evidence must be credible and if the jury are the judges of the credibility of the evidence, that until the jury determines whether the rebutting evidence is credible, the findings must stand throughout the case and must prevail, and to that extent given weight if the countervailing evidence is found not credible.

This interpretation of the courts instructions is not only a possible one, but an entirely permissible one. The plaintiff not only relied upon the findings and order, but offered testimony on all phases of the

case as to shipment, freight charges, breakage, the Long-Woodworth agreement, and all the other matters referred to in the findings. In other words, it proved its case independently of the findings for the purpose of rebutting the case made by the defendant.

Furthermore, there were matters in the findings which were not met by the defendant's evidence at all, and certainly those portions of the findings would clearly stay throughout the case.

In *McMullen v. Warren Motor Co.,* 174 Wash. 454, (cited App. br. 280), and decided before *Karp v. Herder,* 81 Wash. Dec. 511, supra, the court instructed the jury in consolidated actions for personal injuries resulting from an automobile collision:

> "You may take into consideration this admission (ownership of automobile), and the resulting presumption, together with all of the other facts and circumstances of the case, in determining whether or not, at the time and place of the collision, the said Dewey Rochester was engaged, in whole or in part, in the business of the Warren Motor Company.'

The Court said:

> "The instruction concluded with the statement that the presumption referred to was rebuttable, but the question as to whether Rochester was, at the time and place of the accident, engaged in the business of the appellant, was one for the jury's determination. . . "

> "The instruction is technically erroneous, in that the jury could infer therefrom that the presumption could be treated as evidence, together with all the other facts and circumstances in the case, while the rule of law is, as above pointed out, that the presumption is not evidence. The presumption, however, was still in the case because it had not been met by disinterested witnesses, and it should have been called to the jury's attention, not as evidence, but as a mere presumption or conclusion. Since the presumption would have been sufficient to take the case to the jury without other evidence on the part of the respondents, it does not appear to us that the instruction, while erroneous in the respect pointed out, was prejudicial. It only told the jury that they coud take into consideration the presumption, together with all the other facts and circumstances, and only by inference could it be said that the presumption was called to the jurys attention as evidence."

So here. In light of the fact that evidence was introduced by both sides for the purpose of proving and rebutting a cause of action sufficient to take the case to the jury on the issues of fact so made, and in view of the fact that the jury's attention was called to the presumption and its right to weigh the presumption as evidence only by inference, the error, if it be error, is not prejudicial.

ANSWER TO No. 54

(Tr. 316-317, 326, 472; App. br. 256, 295, 311)

Appellant contends the court erred in instructing the jury generally as to the fact that the findings and order of the department were prima facie evidence of the facts therein stated, and not of the liability, comments, statements or opinions of the law. Appellant contends the court should have deleted and segregated and pointed out what were findings of fact. This contention has already been considered and negatived. (See br. 22, 60).

ANSWER TO No. 55

(Tr. 318, 327, 473; App. br. 125)

Appellant contends that the court erred in instructing the jury that the term board measure in tariff 51 was ambiguous. Appellant contends that the term board measure was unambiguous as a matter of law. For answer see brief 19.

ANSWER TO No. 56

(Tr. 318-319, 327, 474; App. br. 334, 344)

Appellant contends the court erred in instructing the jury that the proper method of scaling logs under tariff 51 is that method which the jury finds accepted

and applied commercially in the logging industry. Appellant contends that this instruction improperly excluded from the jury's consideration every other rule of interpreting ambiguous tariffs. It is also claimed that this instruction was contradictory, with an earlier instruction to the effect that it was for the jury to determine what was the proper method of scaling the logs to ascertain the correct board measure. (App. br. 344).

There is no necessary contradiction in telling the jury that ambiguities must be interpreted in the commercial sense, and also telling the jury that it is for it to decide which of the competing methods of scaling was the one accepted commercially. That that is all that the court meant is shown by a later instruction reading:

> "If you find a preponderance of the evidence that the defendant's method of scaling was the commercial method used generally in the logging industry and that by such method no overcharges resulted, then your verdict shall be for the defendant.
>
> "But if you find from a preponderance of the evidence that the plaintiff's method of scaling was the commercial method used generally in the logging industry and that by applying that method overcharges were suffered by plaintiff in the freight charges exacted by defendant, then your verdict should be for the plaintiff." (Tr. 319).

That it was proper for the court to instruct the jury that ambiguities should be interpreted in the comercial sense is clear from what has heretofore been said. The interpretation of tariff 51 as appellant itself contends is a question of law for the court. (App. br. 122). What that law is has been determined by the Supreme Court of Washington acting judicially and declaring the law of the State by which to test the reasonableness and lawfulness of the findings and order. (See br. 17, 19, 60). That law is binding on the Federal Court, hence it is proper to instruct the jury in accordance with that law. It is not for the jury to determine the question as to what that law is. It is, therefore, entirely proper for the court to instruct the jury as to the law to be applied in construing the ambiguity in accordance with the law of the State of Washington.

ANSWER TO No. 57

(Tr. 319-320, 327-328, 475; App. br. 125, 335)

Appellant contends that the court erred in instructing the jury that in determining the meaning of board measure it might consider the construction made by the Department of Public Works along with other evidence in the case. It is argued that this was im-

proper because the tariff was not ambiguous as a matter of law. For answer, see brief page 19.

It is also argued that the decision of the Department as to the interpretation of the tariff is without any force whatsoever (App. br. 335), but the authorities cited for this proposition arise under the I. C. C. and merely hold nothing more than that the construction of a tariff by the I. C. C. is not binding on the court. They do not hold that it is without any force whatsoever. Futhermore, the law of Washington, as stated in *Northern Pacific Railway Co. v. Sauk River Lumber Company,* 160 Wash. 691, 693:

> "The tariff under which the logs moved not defining board measure, when the question was presented it became primarily a question for the Department of Public Works to determine."

If the Department, acting under the authority given it by statute to construe doubtful tariffs makes a construction, it would seem entirely proper that construction should be considered along with other evidence in determining whether the construction was correct. That is all that the assailed instruction attempts to do.

In any event, the departmental construction being in accordance with the law of the State of Washington as announced in the *Northern Pacific Railway Co.*

v. Sauk River Lumber Co., case, supra, no error resulted. (See br. p. 160).

ANSWER TO No. 58

(Tr. 320, 328-329, 476; App. br. 344, 345)

Appellant contends that the court erred in instructing the jury that if they found the method accepted comercially resulted in the carriage of some logs without compensation, that fact would make no difference. It is contended that this instruction violated the principle that free carriage is illegal. But as heretofore pointed out, that principle is inoperative in collateral attack. It must be conclusively presumed that the free carriage in form is not really free in fact. (See br. p. 25).

ANSWER TO No. 59

(Tr. 321, 328-329, 477; App. br. 344)

Appellant contends the court erred in instructing the jury that if the proper application of the scale commercially used showed overcharge, the plaintiff could recover. It is argued that this gives an interpretation of board measure which would exclude compensation for cull logs. The answer is the same as that made to assignments 56 and 58. See brief page 175.

ANSWER TO No. 60

(Tr. 341, 477; App. br. 125, 137, 146, 159, 172, 181, 192, 212, 247)

Appellant contends the court erred in refusing to instruct a verdict for the defendant. This argument is based on the same matters argued under assignment of error 23, and the answering argument made thereto need not here be repeated. See brief page 77.

ANSWER TO No. 61

(Tr. 329, 341, 478; App. br. 247, 256);

No. 62

(Tr. 330, 341, 478; App. br. 256, 283);

No. 63

(Tr. 330, 341, 479; App. br. 256, 284);

No. 64

(Tr. 331, 341, 480; App. br. 256, 284);

No. 65

(Tr. 332, 341, 481; App. br. 256, 284);

No. 66

(Tr. 333, 341, 482; App. br. 256, 285);

No. 67

(Tr. 333, 341, 483; App. br. 256, 287);

No. 68

(Tr. 334, 341, 485; App. br. 258, 287);

No. 69

(Tr. 335, 341, 486; App. br. 256);

No. 70

(Tr. 336, 341, 487; App. br. 256, 288);

No. 71

(Tr. 336, 341, 487; App. br. 256, 289);

No. 72

(Tr. 337, 341, 488; App. br. 256, 290);

No. 73

(Tr. 337, 341, 489; App. br. 256, 290);

No. 74

(Tr. 338, 341, 490; App. br. 256, 291);

No. 75

(Tr. 338, 341, 490; App. br. 256, 291);

No. 76

(Tr. 339, 341, 491; App. br. 256, 292);

No. 77

(Tr. 339, 341, 491; App. br. 256, 292);

No. 78

(Tr. 339, 341, 492; App. br. 256, 293).

Appellant contends that the court erred in refusing

to instruct the jury to disregard the whole of the findings and order and alternatively to disregard specific parts thereof. This contention is the same as that raised by assignments 4 to 22, inclusive, to which answer has heretofore been made and need not here be repeated. (See brief page 60).

ANSWER TO No. 79

(Tr. 341-342, 344, 494; App. br. 256, 316);

No. 80

(Tr. 343, 344, 495; App. br. 256, 316).

Appellant contends the court erred in refusing to instruct the jury that the findings of the Department cannot be "weighed and considered" in opposition to the testimony of witnesses in open court. This assignment raises the same questons as that considered under assignment 53, and the answer thereto need not here be repeated. See brief page 162.

Furthermore, the instruction does not sufficiently refer to the fact that the countervailing evidence, particularly countervailing documentary evidence, must be credible.

ANSWER TO No. 81

(Tr. 343, 344, 496; App. br. 256, 323)

Appellant contends the court erred in refusing to instruct the jury that there is no presumpton of

liability by reason of the entry of the Departmental order awarding reparation. The requested instruction was given in substance, when the court instructed on the effect that the findings and order should have as prima facie evidence of the facts stated, and specifically stated also that it was not prima facie evidence of "the liability of the defendant". (Tr. 317).

The court also instructed that the jury must take the law as given by the court and determine the case upon the evidence before it. Tr. 317, 318). There is, of course, no duty on the part of the court to instruct in the proposed language of one party or the other. It may instruct in its own language. See *Stanhope v. Strang,* 140 Wash. 693.

ANSWER TO No. 82

(Tr. 344-345, 497; App. br. 256, 323)

Appellant contends the court erred in refusing to instruct that the findings of fact of the Department are not prima facie evidence of liability. This assignment raises substantially the same question as assignment 81, and for answer see the answer thereto. (See brief page 182).

ANSWER TO No. 83

(Tr. 345-346, 497; App. br. 256, 325)

Appellant contends the court erred in refusing to instruct the jury that the order of reparation is not evidence of any fact in this case, or of liability. This assignment raises the same question as assignment 81, and is answered in the same way. (See brief p. 182).

The last sentence of the proposed instruction is also misleading. It reads:

> "You will not consider said order of the Department of Public Works for any purpose whatever in deciding on your verdict in this case."

This, in effect, was a direction to disregard evidence properly admitted under the statute. (R. R. S. 10350). This was clearly an improper sentence to include in its proposed instruction.

ANSWER TO No. 84

(Tr. 346, 498; App. br. 256, 325)

Appellant contends the court erred in refusing to instruct the jury that the force of the findings of fact entered by the Department were not enhanced by proceedings through the State courts. This was an unnecessary instruction, because the effect to be given to the findngs and order were clearly pointed out by

the trial court. Furthermore, the instruction was untrue in that the effect of an affirmance by the Supreme Court of the findings and order is a judicial holding that the findings and order are reasonable and lawful, thereby carrying greater weight than if they were not, even though it be true that the findings and order with or without an appeal are still prima facie evidence of the facts therein stated. But to state that the validity of the findings of fact was not enhanced or increased as requested, is not correct. Findings judicially declared to be valid are certainly worth more than findings upon which no such judicial declaration has been made.

Furthermore, there was included in the proposed instruction the statement,—

> "... It is your duty to determine what the *true* facts are and apply the law to those facts." (Italics ours).

This portion was misleading, in that it suggested that the findings were untrue.

ANSWER TO No. 85

(Tr. 346-347, 499; App. br. 326)

Appellant contends that the court erred in refusing to instruct the jury that the decision of the Supreme Court was not before it and that in arriving at its

verdict it should "not consider at all the decision of the Supreme Court of Washington."

As heretofore pointed out, while the wording of the decision was not in evidence nor read to the jury, the action of the Supreme Court, in reversing the action of the Superior Court and reinstating the findings and the award of the Department, was a fact in evidence. If the jury were not to consider the decision of the Supreme Court in reinstating the findings and order, plaintiff would have been in a position of suing upon findings and order set aside by the Superior Court as being invalid. Why the jury should be instructed to disregard evidence in the case in that manner is not explained by appellant. How the Supreme Court's decision was in the case has heretofore been pointed out. (See brief page 153).

ANSWER TO No. 86

(Tr. 347, 348, 499; App. br. 351)

Appellant contends the court erred in refusing to instruct the jury that neither party to the proceeding was under any duty to offer all of its available evidence at the hearing before the Department, and could choose instead to present its defense for the first time on a trial to a court and jury. But the court had let in all the proper evidence offered by the defendant

to rebut the findings, and the appellant had shown that there were additional witnesses at the trial that were not before the Department. Furthermore, the court also instructed the jury (Tr. 318):

> "In considering the findings of the Department, you have a right to consider the fact, if it be a fact, that new or additional evidence has been introduced before you which was not before the Department."

This clearly implied the right expressly stated in the proposed instruction, and was sufficient.

ANSWER TO No. 87

(Tr. 348-349, 500; App. br. 146, 337)

Appellant contends that the court erred in refusing to instruct the jury that ambiguous terms in a tariff should be interpreted by practical construction of the parties. This raises the same question as that heretofore considered, and the answer heretofore made is referred to. (See br. p. 19). Clearly the practical construction so called of one party to the joint tariff would not be sufficient even if it were otherwise proper.

ANSWER TO No. 88

(Tr. 348, 350, 502; App. br. 146, 338)

Appellant contends the court erred in refusing to instruct the jury that an ambiguous term is to be

construed in accordance with the practical construction of the parties. The answer to this assignment is the same as the answer to assignment 87, and reference is made thereto. (See brief page 187).

ANSWER TO No. 89

(Tr. 348, 350, 503; App. br. 137, 339)

Appellant contends the court erred in refusing to instruct the jury that an ambiguity should be construed reasonably. For answer see brief page 19.

Furthermore, the proposed instruction was erroneous in that the question of whether ambiguity exists was left to the jury. (See br. p. 177).

ANSWER TO No. 90

(Tr. 348, 350, 503; App. br. 137, 339)

Appellant contends the court erred in refusing to instruct the jury that in construing a tariff all its terms and provisions must be considered together. For answer, see brief page 19.

Furthermore, the instruction is erroneous in that it leaves the existence of ambiguity to the jury.

ANSWER TO No. 91

(Tr. 348, 351-352, 504; App. br. 159, 340)

Appellant contends the court erred in refusing to

instruct the jury that an ambiguity must be construed so as to render the tariff legal. For answer see brief p. 20. The instruction is further erroneous in that it leaves the question of whether ambiguity exists to be determined by the jury.

ANSWER TO No. 92

(Tr. 348, 352, 353, 506; App. br. 212, 253, 341)

Appellant contends the court erred in refusing to instruct the jury concerning the resolving of ambiguities against the party preparing the instrument. For answer see brief 23, 17. The instruction was further erroneous in that it included the following:

> "You are further instructed that this rule does not apply in any case where the document represents the joint effort of both parties or where both parties are equally responsible for its wording."

There is no evidence that tariff 51 was prepared by the plaintiff or by the shippers. The carriers themselves chose the form that the tariff should take in compliance with what they believed the Long-Woodworth agreement meant. There was, therefore, no evidence for that portion of the instruction to rest upon.

ANSWER TO No. 93

(Tr. 348, 353, 506; App. br. 212, 253, 341)

Appellant contends the court erred in refusing to instruct the jury that the ambiguity in tariff 51 should be resolved against the shipper. For answer see assignment 92.

ANSWER TO No. 94

(Tr. 353-354, 507; App. br. 212, 253, 256, 318, 342)

Appellant contends the court erred in refusing to instruct the jury that the construction of board measure by the Department was improper and inapplicable, it having applied the wrong rule under the facts of this case. However, the rule followed by the Department was approved by the Supreme Court of Washington, and the law by which the Departmental conclusion was tested required the commercial interpretation to be made. To have instructed the jury as contended for by appellant would have been to instruct the jury contrary to the law of the State of Washington. The requested instruction was clearly improper. (See brief pages 17, 19, 23).

ANSWER TO No. 95

(Tr. 355, 509; App. br. 125, 256, 318)

Appellant contends that the court erred in refusing to instruct the jury that the term board measure is

not ambiguous and the Department was wrong in treating board measure as ambiguous. For answer see brief pages 19 and 78.

ANSWER TO No. 96

(Tr. 356, 510; App. br. 192)

Appellant contends the court erred in refusing to instruct the jury that it was not necessary for the defendant's scaling rules to be filed with the Department of Public Works, and that the unpublished scaling rules observed by the defendant are binding on the parties. For answer, see brief pages 19, 21, 22.

ANSWER TO No. 97

(Tr. 356-357, 510; App. br. 192)

Appellant contends that the court erred in refusing to instruct the jury that the appellant's unpublished scaling rules were binding. For answer, see 21, 22.

ANSWER TO No. 98

(Tr. 357, 511; App. br. 346)

Appellant contends that the court erred in refusing to instruct the jury that the shippers' protest of the use of the Northern Pacific scaling method from time to time was immaterial except as bearing on the question of the shippers' knowledge of railroad scaling practices; but clearly protest would be evidence

of the shipper's understanding of the term board measure which this instruction entirely overlooks. Furthermore, it is improper since it attempts to raise the issue of estoppel, for answer to which, see brief 100, 102.

ANSWER TO No. 99

(Tr. 357-358, 512; App. br. 256, 318);

No. 100

(Tr. 358-359, 513; App. br. 256, 318);

No. 101

(Tr. 359-360, 514; App. br. 256, 318);

No. 102

(Tr. 359, 360-361, 515; App. br. 256, 318);

No. 103

(Tr. 359, 361-362, 516; App. br. 256, 318);

No. 104

(Tr. 362-363, 517; App. br. 256, 318);

No. 105

(Tr. 363-364, 518; App. br. 256, 318).

Appellant contends the court erred in refusing to specifically instruct the jury on specific findings, instructing the jury which findings to disregard. They raise but one question, namely, the duty of the court to specifically pick out, delete and instruct on specific

findings, which duty has heretofore been considered and negatived. See answer to assignment 23.

Futhermore, the various matters covered in the proposed instructions which are the subject matter of the foregoing assignments deal with evidence from which the Department concludes that board measure means board measure according to the commercial method. Since that is the law of the State of Washington, no prejudice could result to the appellant by the court's refusal to specifically refer to each of the findings, point out their alleged inaccuracies, when the rule ultimately to be applied would be the same whether those findings were accurate or not, namely, that board measure should be construed in its commercial sense.

ANSWER TO No. 106

(Tr. 363, 364-365, 519; App. br. 176)

Appellant contends the court erred in refusing to instruct the jury that they should deduct from the amount claimed such loss in scale due to breakage as they should find took place.

But there was no error in refusing this requested instruction, for the court instructed the jury, (Tr. 320):

"If from a preponderance of the evidence you

find that there was breakage of logs resulting in loss of scale and loss of logs by breakage, sinking or otherwise, deduction for which is not permissible under such proper commercial scale, your verdict must be for the defendant unless the plaintiff establishes by a fair preponderance of the evidence that the amount thereof was less than the amount of the alleged overscale."

(Tr. 321) "The same is true of errors or incompetence in scaling. If the claimed overcharge is found by you from the evidence to be caused in whole or in part by errors or incompetence of scalers, so much of the alleged overcharge, if any, as was due to such errors or incompetence, if any, must be deducted from the amount, if any, of such overcharge."

ANSWER TO No. 107

(Tr. 365, 520; App. br. 176)

Appellant contends that the court erred in refusing to instruct the jury that if breakage of logs resulted in loss of scale and loss of logs by sinking or otherwise, its verdict must be for the defendant unless plaintiff proved that the amount of the overcharge was less than alleged overscale. This instruction was given substantially in that form by the court. (Tr. 320, br. 193).

ANSWER TO No. 108

(Tr. 365-366, 521; App. br. 172)

Appellant contends the court erred in refusing to instruct the jury that if plaintiff knowingly delayed

proceedings to collect its claims for over a year, it was estopped to recover. For answer see brief 100, 102.

It should be pointed out in passing that this alleged defense was not pleaded.

ANSWER TO No. 109

(Tr. 366-367, 522; App. br. 346, 349)

Appellant contends the court erred in refusing to instruct the jury that appellant was entitled to collect freight for culls. To have so instructed, however, would have been inconsistent with the instruction on the commercial method, and it was therefore properly rejected. (See brief 175, 187 to 191).

ANSWER TO No. 110

(Tr. 367-368, 522; App. br. 346)

Appellant contends the court erred in refusing to instruct the jury among other things that:

> "If you believe from the evidence that the difference between the railway sale and bureau scale of only 5.2% is no greater than permitted by the bureau scale as a margin of error in its own scale, then the verdict must be for defendants."

There was clearly no evidence to warrant any such instruction. The mere fact that commercial scalers might differ in their estimates by 5% did not mean that the scale as actually made on behalf of appellee

is incorrect to the extent of 5%. However close two scalers might come in scaling the same raft of logs is no evidence that the scale actually made is incorrect. This proposed instruction was viciously misleading.

Furthermore, the evidence was also to the effect that there was no such rule as the 5% tolerance rule. Mr. Stuchell, President of the Eclipse Mill, testified (Tr. 246):

"I do not know what the rule of tolerance is."

Mr. Hayes, who scaled 95% of the logs in suit, testified (Tr. 249):

"I never heard of the 5% tolerance rule."

Therefore, insofar as the same requested instruction stated "that it is recognized by the rules of the scaling bureau that competent commercial scalers will differ in their estimates by 5%," the instruction would have been in contradiction to some of the testimony in the case.

Furthermore, the court instructed the jury:

> "If you find, from a preponderance of the evidence, that the overcharges, or any part thereof, claimed by plaintiff, were justified or made permissible by reason of an applicable general rule of tolerance or forgiveness based on average errors in scaling, then so much of plaintiff's claim

as was so justified or permissible should be deducted from such overcharges, if any."

This, in substance, gave the requested instruction of appellant, and was far more favorable to appellant than it was entitled to receive.

ANSWER TO No. 111

(Tr. 367, 368, 524; App. br. 346)

Appellant contends the court erred in refusing to instruct the jury that if they found that Hayes was an erratic scaler and that his scaling was unreliable, the jury's verdict must be for the defendant. The same requested instruction included a statement to the effect that the difference between the railway and Bureau scale was 5.2% and that Hayes scaled approximately 95% of the plaintiff's logs. The instruction was clearly improper not only because there was no particular relationship between the difference in the Bureau and the railway scale of 5% and the fact that Hayes scaled approximately 95% of the plaintiff's logs, but also because it called for a verdict that the plaintiff was entitled to nothing even for the remaining 5% of the logs which Mr. Hayes did not scale, and would take from the jury its right to determine whether the scaling actually made of the Sauk logs

was substantially correct, even though ordinarily Hayes was an erratic scaler.

There was testmony also that Hayes was erratic by scaling too high. (Tr. 119, 246). How then, could this, if believed, justify a verdict for the defendant, since the higher the scale the more freight was paid to the defendant. If the shipper sued for less than that to which it was entitled, this could not justify a verdict for the defendant.

Furthermore, the jury were adequately instructed on the question of errors and incompetence in scaling, and the effect thereon in deducting from the amount all the claimed overcharge. (Tr. 321).

ANSWER TO No. 112

(Tr. 368-369, 524; App. br. 172)

Appellant contends the court erred in refusing to instruct the jury that it was the shipper's duty to object promptly on learning that the appellant was not following the commercial method of scaling and upon the jury's finding that it failed so to do, its verdict must be for the defendant. For answer, see assignment 108. Furthermore, there is no evidence upon which this instruction could be based, namely that the Sauk River Lumber Company knew prior to

1927, that the Northern Pacific was not following the commercial method. Furthermore, this instruction. even if otherwise proper, fails to limit the recovery of the shipper to overcharge made prior to knowledge of the fact that the Northern Pacific was not following the commercial method. A verdict for the defendant under such state of facts would mean that even if the Sauk River Company had no knowledge whatsoever for six months of the Northern Pacific method of scaling, and that thereafter acquired knowledge and failed to object for another six months, that it could recover nothing even for the first six months.

ANSWER TO No. 113

(Tr. 369-370, 525; App. br. 172)

Appellant contends that the court erred in refusing to instruct the jury that if plaintiff knew on or before January 1, 1926, that the defendant did not apply the commercial method and failed to object until after the year had elapsed, the jury's verdict should be for the defendant. For answer, see assignment 112. This so-called defense was not pleaded. Furthermore, it is not a defense. It is for the carrier to charge the proper scale, and it is as much charged with knowledge of the law as is the shipper. Under such circumstances there can be no estoppel. (See brief 20).

ANSWER TO No. 114

(Tr. 370-371, 526; App. br. 318)

Plaintiff contends that the court erred in refusing to instruct the jury to disregard all evidence and argument of plaintiff's counsel as to the difficulty of correctly scaling logs on cars, and as to the inexperience of railroad scalers and all evidence or argument that the railway scale was incorrect under its own scaling rule.

Such an instruction would have clearly disregarded the findings on the question, which were prima facie evidence unless the jury believed credible countervailing evidence, and was a matter of detail which the court could properly refuse to give. In any event, the court, in its own instructions, dealt fully with the question of placing upon the plaintiff the burden of showing the amount of the overcharge. The instruction disregarded the value of such testimony as bearing on the accuracy of the Bureau scale which was made in the water. The evidence clearly showed that that amount was based upon the difference between the railway footage and the shipper's footage based upon the commercial scale. There was, therefore, no need for this instruction, which was, after all, also misleading.

ANSWER TO No. 115

(Tr. 371-372, 527; App. br. 212)

Appellant contends that the court erred in refusing to instruct the jury that if the appellant scaled plaintiff's logs prior to October 1, 1925, by its own scaling rule, and continued to so scale after tariff 51 took effect, that the jury's verdict must be for the defendant. It is argued in support of this instruction that the Long-Woodworth agreement is a bar to this claim. For answer, see brief 114. It should be pointed out in passing that appellant by this instruction is seeking to treat tariff 51, a joint tariff, as though it were a severable tariff with one construction applicable for the Northern Pacific and another for the other carriers. Furthermore, the error claimed is unavailing for the reason that there was no exception saved to the action of the trial court in not submitting to the jury the question of estoppel by Long-Woodworth agreement in its instrution upon the pleadings. If the error on an issue not submitted to the jury is not available, it would seem not available if an instruction under such unavailable issue is requested, even though an exception be saved to the refusal to give the instruction.

ANSWER TO No. 116

(Tr. 372-373, 528; App. br. 192)

Appellant contends the court erred in refusing to instruct the jury that the Northern Pacific's unpublished scaling rules, unpublished in reliance upon the the Department's administrative construction, is binding, and that the jury's verdict must be for the defendant. For answer, see brief 22.

In passing, it should be pointed out that this instruction in effect told the jury that even though board measure meant commercial scale, the Northern Pacific's unpublished scaling rules were binding.

ANSWER TO No. 117

(Tr. 373-374, 529; App. br. 172)

Appellant contends that the court erred in refusing to instruct the jury that the plaintiff could not recover unless the jury found that the plaintiff was not misled by the ambiguity in tariff 51. It is argued that the plaintiff would be estopped to recover. This proposed instruction was but another form of the instruction which is the basis of assignments of error 112 and 113, and the answer there made is here applicable. It should be pointed out that there was no evidence of shipment with such knowledge, and no pleading to warrant that instruction.

CONCLUSION

While we regret the length of this brief, we have had no choice but to answer each of the arguments and discuss each of the assignments of error claimed to exist by appellant. Having carefully examined each of the contentions and all the authorities cited in appellant's brief, we are convinced that appellant's suggestion that the record in this case is "an inexhaustible mine of error" is wholly without foundation, and exists solely because of appellant's views as to the law applicable in this case. It is respectfully submitted that none of the appellant's assignments of error are well taken.

Respectfully submitted,
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No. 7887

In the United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY, a corporation,

Appellee and Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT

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INDEX

Page

CROSS APPELLEE'S CONTENTIONS 1

CROSS APPELLANT'S ANSWER .....2 *et seq.*

INDEX OF CASES

Campbell River Mills case, 53 Fed. (2d) 69..... 6

Duff v. Fisher, 15 Cal. 375 6

Elfring v. New Birdsall Co., 96 N. W. (S. D.) 703.. 6

New v. Oklahoma, 195 U. S. 252, 25 S. Ct. 68, 49 L. Ed. 182 6

Pennsylvania Railroad Co. v. Puritan Coal Co., 237 U. S. 121 4

Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239..... 3

STATUTES

Rem. Bal Code 5305 3

Rem. Code 5305 3

Rem. Comp. Stat. 5841 3

Rem. Rev. Stat. 5841 3

Rem. Rev. Stat. 10339 to 10459 3

Rem. Rev. Stat. 10433 5

Rem. Rev. Stat. 10350 5

Laws of '11, §109, p. 611 2

Laws of '11, §111 2

Laws of '11, §112 2

TEXTS

59 C. J. 1117 3

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ARGUMENT

The sole question remaining for decision after reading the brief of cross-appellee, is whether the 8% statute is applicable. If it is, it is admitted that the court may add interest at that rate to the verdict, and it is not seriously questioned that it may add interest at the proper rate on the constituent items of $5300.34

from July 1, 1926, to date of judgment, and on the sum of $3982.29 from January 1, 1927, to date of judgment. It is argued, however:

1. That Rem. Rev. Stat. 5841 fixing interest at 8% has been repealed by implication by the 1911 Public Service Commission Law (Cross-App. br. p. 12).

2. If not repealed, the statute is penal and in derogation of the common law, and should be strictly construed and not here applied (ibid. 4).

3. In any event, the Northern Pacific's unpublished scaling rule is binding, or the commercial scaling rule, which is unpublished, is not binding, and is not a part of tariff 51 (ibid. 4).

The first two points are scarcely argued, and need not detain us long.

1. It would have been an easy matter for the legislature when it passed the Public Service Commission Law in 1911, to have expressly repealed the 8% interest statute along with other statutes which it repealed expressly (Laws of '11, §109, p. 611). Furthermore, §§111 and 112 of that act treated the 1911 Act not as a new enactment, but as a continuation of the earlier statutes. Section 112 provided:

> "This Act, in so far as it embraces the same subject-matter, shall be construed as a continuation of Chapter 81 of the Laws of 1905, and the Acts amendatory thereof and supplemental thereto. . ."

Furthermore, the Public Service Commission law was amended in 1913, 1915, 1919, 1921, 1923, 1927, 1929 and 1933 as appears from the references thereto in Rem. Rev. Stat. 10339 to 10459. And yet the legislature has not seen fit to repeal the foregoing 8% interest statute. Furthermore, every code that has been published since 1911 has expressly made the foregoing 8% interest statute a part thereof, as part of the existing statutory law of the State of Washington (Rem. Code §5305; Rem. & Bal. Code §5305; Rem. Comp. Stat. §5841; Rem. Rev. Stat. §5841). Despite the fact that each of these codes has been adopted as the official code of the State of Washington by the legislature, no amendment or repeal of the 8% statute has ever been effected. In face of this continuous legislative history of the matter, it can scarcely be claimed that Rem. Rev. Stat. 5841 has been repealed by implication.

2. The carrier contends that the foregoing statute is, however, penal and in derogation of the common law and should be strictly construed. Strict construction, however, does not mean that the intention of the legislature is to be disregarded. If the legislature's intent can be ascertained, strict construction will not prevent giving effect to that intention.

See

59 C. J. 1117,

Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239.

The intent of the statute has heretofore been argued

in cross-appellant's brief on the question of what is meant by price rate or tariff required to be published, and need not here be repeated.

3. The carrier's most serious contention is that the Northern Pacific's unpublished scaling rule is binding and need not be filed, or alternatively, that the unpublished scaling rule of the commercial scale is not binding, and that for either or both of the foregoing reasons the 8% statute does not apply.

That an unpublished scaling rule is not binding, see Appellee's Brief, page 110. In passing, it should be pointed out that the case of *Pennsylvania Railroad Co. v. Puritan Coal Co.*, 237 U. S. 121, cited in cross-appellee's brief page 6, as a case in which a carrier was held liable for damages for disregarding its own unpublished car service rules, was a case in which the rule was not attacked, and the action was for breach of the carrier's common law duty. The Interstate Commerce Commission cases cited on the same page have been shown not to be in point in appellee's brief, page 110.

Nor can it be contended that the commercial scaling rule not being published is not binding. That rule was published, because the carrier published its rate in terms of board measure, a trade term meaning board measure commercial scale. The jury having found for the shipper, the carrier is concluded by that verdict and cannot now reopen the question as to what

board measure means. We again refer to cross-appellant's brief stating our reasons for believing the statute applicable, and again reiterate what was there pointed out, page 22, that the carrier having published its rate in terms of board measure, and the jury having found for the plaintiff, it necessarily follows that the carrier charged a rate in excess of its published tariff and therefore comes within the 8% statute. (Compare brief of cross-appellee, p. 5).

While the carrier does not seriously question the right of the court to add interest from each of the constituent cut off periods in determining the amount on which and the times from which the interest should be calculated, it selects a sentence from cross-appellant's brief, page 24, without quoting the earlier portion of the paragraph in connection with which it must be construed. All that was meant was that since the jury disbelieved testimony offered on behalf of the defendant on the question of lost, stolen and broken logs by finding for the full amount claimed by the shipper, and since the testimony was undisputed as to when the overcharges were exacted, on the theory that there was no lost, stolen, or broken logs that affected the scale, the court should not only have added interest on the basis of 6%, but should have applied the basis of 8%.

The interest doesn't run under the statute (R.R.S. 10350) from the date of protest or demand for repayment. It runs, according to R.R.S. 10433, "from

the date of collection" of the overcharge. The Department on this question follows the statute, for it requires the payment of interest "from date of collection" (Tr. 93).

Campbell River Mills case, 53 Fed. (2d) 69, (Cr.-App. br. p. 10), is cited as inferential authority for its view that the 6% statute should govern because in that case the reparation bore 6% interest. But the question of interest was not raised in that case, and no inference one way or the other can be claimed as to the propriety of the interest charged. It will hardly be contended that a case which does not decide a question and one in which the question is not even raised, is authority for a proposition direct or indirect.

See

Duff v. Fisher, 15 Cal. 375;
Elfring v. New Birdsall Co., 96 N. W. (S.D.) 703;
New v. Oklahoma, 195 U. S. 252, 25 S. Ct. 68, 49 L. Ed. 182.

While there is, therefore, no direct authority one way or the other, it is submitted that a reasonable interpretation of the 8% interest statute requires its application in this case.

Respectfully submitted,

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Appeal From the District Court of the United States for the Western District of Washington Northern Division

Supplemental Brief of Appellant and Cross-Appellee

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INDEX

Page

Statement of the Case ---------- 1

ARGUMENT

Point I—Appellee not entitled to recover under the undisputed evidence ---------- 7

Construction of tariff presents question of law ---- 7

(1) Tariff 51 not ambiguous ---------- 8

(2) Appellee's construction does not give effect to all provisions of tariff ---------- 8

(3) Practical construction controls ---------- 9

(4) Appellee's construction makes tariff illegal ------ 11

(a) Appellee's construction makes tariff confiscatory ---------- 11

(b) Appellee's construction makes tariff discriminatory ---------- 12

(c) Appellee's interpretation results in free carriage ---------- 12

(5) Appellee has waived reparation ---------- 13

(6) Appellee cannot recover because he was not damaged ---------- 13

(7) Appellant's scaling rules are binding though unpublished ---------- 17

Scaling rules need not be published under administrative construction of tariff ---------- 17

(8) The settlement of Sept. 24, 1925, bars appellant's claim ---------- 18

Point II—Department's findings not admissible ---------- 19

Point III—Evidence of scaling practices of other railroads was inadmissible ---------- 20

Point IV—Instructions ---------- 21

(1) Effect of findings ---------- 21

(2) Effect of proceedings in state court ---------- 22

(3) Rules for interpretation of tariffs ---------- 22

Point V—Error in striking counterclaim (not reargued) --- 22

Point VI—Free carriage (Not reargued) ---------- 22

Point VII—Error in admitting conclusion of witness as to evidence before Department ---------- 22

Point VIII—Error in denying motion to dismiss for want of jurisdiction because order lacks finality------ 23

Point IX—Error in refusing to dismiss because Department was disqualified ---------- 23
Point X—Error in denying motion to dismiss, etc., because Department of Public Works is a necessary party 24

TABLE OF CASES

Page
Adams v. Mills, Director General, 286 U. S. 397 ---------- 9
Aetna v. Hyde, 275 U. S. 440 ---------- 20
Andrew Murphy v. Ann Arbor Co., 147 I. C. C. 449 ---------- 8
Arizona Grocery Co. v. A. T. & S. F., 284 U. S. 370---------- 14
Atlantic Coast Line v. Florida, 79 L. Ed. 719 ---------- 13
Becker v. N. P. Ry. Co., 93 I. C. C. 368 ---------- 17
Belcher v. Tacoma Eastern R. Co., 99 Wash. 34 ---------- 23
Berwind-White Coal Min. Co. v. Chicago & E. R. Co., 235 U. S. 371 ---------- 9
Brinkerhoff v. Hill, 281 U. S. 673 ---------- 18
Central R. Co. of New Jersey v. United States, 257 U. S. 247 ---------- 17-20
Central R. Co. of New Jersey v. Martin, 175 Atl. 637 ---------- 18
C. M. St. P. & P. R. Co. v. Campbell River Mills, 53 Fed. (2) 69 ---------- 7-23
C. M. St. P. & P. R. Co. v. Adams County, 72 Fed. (2) 816 23-25
Davis v. Portland Seed Co., 264 U. S. 403 ---------- 14
Detroit etc. R. Co. v. I. C. C., 167 U. S. 633 ---------- 17
Dugan v. Ohio, 277 U. S. 61 ---------- 24
General Motors v. G. T. W. Ry. Co., 118 I. C. C. 99 ---------- 8
Gentile Co. v. Tidewater So. R. Co., 140 I. C. C. 621 ---------- 17
Great Northern v. Delmar, 283 U. S. 686 ----------8-11-14
Great Northern v. Department, 161 Wash. 29 ---------- 19
Great Northen v. Sullivan, 79 L. Ed. 507 ---------- 14
Great Western El. Co. v. White, 118 Fed. 406 ---------- 8
Hennessy v. Tacoma Smelting Co., 129 Fed. 40 ---------- 25
Hennessy v. Tacoma Smelting & R. Co., 129 Fed. 40---------- 25
Meeker v. Lehigh Valley R. Co., 236 U. S. 412 ---------- 19
Meeker v. Lehigh Valley R. Co., 236 U. S. 434 ---------- 19
Minneapolis etc R. Co. v. Van Dusen, 272 F. 255 ---------- 9
Minnesota Rate Cases, 230 U. S. 352 ----------12-20
North Pacific Coast Freight Bureau v. Department, 156 Wash. 137 ----------16-17
N. P. Ry. Co. v. Baker, 3 Fed. Supp. 1 ---------- 16

N. P. R. Co. v. St. Paul & Tacoma Lumber Co., 4 Fed. (2) 359 ---------- 18
Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287 ---------- 24
P. R. Co. v. Puritan Coal Co., 237 U. S. 121 ---------- 17
Southern Pacific R. Co. v. Van Hoosear, 72 Fed. (2) 903 ---- 7
Tift v. Southern Ry. Co., 138 Fed. 753, 148 Fed. 1021, 206 U. S. 428 ---------- 21
Tumey v. Ohio, 273 U. S. 510---------- 23
Twin City Pipe Co. v. Harding Glass Co., 283 U. S. 353 ---- 18
Western New York & P. R. Co. v. Penn Refining Co., 137 Fed. 343 ---------- 19

TEXTS

Jones on Evidence, Sec. 8e (7) ---------- 21

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,
Appellee and Cross-Appellant.

Appeal From the District Court of the United States for the Western District of Washington Northern Division

Supplemental Brief of Appellant and Cross-Appellee

STATEMENT

The index refers to the same point in appellant's opening brief. To summarize the opening statement, (see Brief page 1):

This suit is to recover on a reparation award of Department of Public Works for alleged overcharges on saw logs hauled in 1926 from Darrington to Ev-

erett, 44 miles, at $2.50 per thousand feet. The tariff quotes "rates in cents per thousand feet"; Item 40 prescribes "the minimum load is 6,000 feet board measure for each car used." Rule 50 is as follows:

"Scaling. Except where logs are scaled by carrier, the shipper shall at his own expense make careful scale of the logs and shall furnish to the railway agent a certificate showing *the actual number of feet* of logs on each car. The railway shall have the right to check-scale logs and revise the shipper's scale if found inaccurate."

No other reference to scaling is found in the tariff.

Appellant has used for many years the Scribner Decimal C table. Upon arrival at Everett, the railroad scaler takes the length and diameter of the log inside the bark, *before the cars are unloaded.* The tables give the number of feet. Thus, a log 40 feet in length and 24 inches in diameter contains 1010 feet by the Scribner table. See Ex. A-2. *The Scribner rule and tables make no deduction for defects.*

In 1906 appellant began to use a scaling rule in connection with the Scribner tables. It was reduced to writing in 1910. (Ex. A-1, Tr. 109.)

The deduction for sap rot and hollows is necessary to obtain actual footage because there is no footage in hollows or sap rot, the latter being found only in wind-falls at the surface resting on the ground. (Tr. 108.)

The evidence is undisputed that appellee's logs were scaled by this rule and freight charges paid in 1926, and for many years prior thereto, as well under

Tariff 51, as under more than a score of previous tariffs in identical form. During the entire period from 1906 to 1927, neither appellee, other log shippers, nor Department said that appellant's tariffs were unlawful *because the scaling rule was not published therein.* That contention was first made in this case. Appellee contends that the so-called bureau or commercial method should have been used. This method is in use by the Puget Sound Log Scaling & Grading Bureau. The bureau is an agency of the loggers, of which Mr. Irving was President in 1926, and Mr. Jamison was a trustee. The bureau scalers measure the logs *after they are unloaded* and the identity of each car is lost. *The minimum rule, therefore, could not be observed.* Berger, Tr. 275. The bureau scalers used the Scribner table, but deduct for defects such as conk, pitch rings, etc., all footage which, in their *uncontrolled judgment*, will not cut into merchantable material. Tr. 120, 121. They also deduct for bowed and crooked logs and for cull or wood logs. Their object is not to obtain the *actual board measure by the Scribner table*, but what they *estimate* is the footage of *good material.* Their scale is purely an estimate and varies at least 5%. Tr. 121, 114. They reject entirely cull or wood logs, defined by the bureau as logs which will not cut out one-third of gross contents into merchantable lumber. Tr. 120. These wood logs have substantial value. Some are run through the mill for their good material and others made into fuel wood. Tr. 120.

The excess footage claimed for wood logs is 1,620,-890 feet, on which freight charges were collected of $4,044.81. This amount is included in the findings of the Department and judgment of the court. The balance of the overcharge is for other defects such as conk, wind shakes, etc., amounting to 2,222,240 feet, on which the charges were $5,237.82. The sum of the two is $9,282.63, the amount of recovery below. *The total excess scale claimed is only* 5.6% *of the railroad scale.* Tr. 80.

The log shippers' bureau was not created until *1913*, whereas appellant has been carrying logs and collecting charges under its own tariffs and scaling rule since *1906*. The bureau scales only logs sold. The buyers are not obliged to accept its scale, and many of them do not. Neither does the bureau scale the logs carried by appellant for mills producing their own logs; for instance, the St. Paul & Tacoma Lumber Company, one of the largest log producers, cuts its own logs and does its own scaling, Tr. 121, 116. The log shippers, including Jamison, president of the Sauk Company, and Irving, one of it stockholders, have always known that appellant did not use the bureau method. That railroad scalers were not *even competent* to scale by the bureau method is one of the grounds of appellee's complaint. Finding (15), Tr. 83.

The complaint was filed with the Department in May, 1927, for the first time claiming an overcharge because the bureau method of scaling was not used. The Department made findings and an order that ap-

pellee, "be, and it hereby is, notified *to pay to the Department of Public Works* in accordance with Chapter 110, Laws of 1921, (Rem. Comp. Stat. 10436) as reparation all sums in excess of the sum of $179,501.92," etc. And the "parties hereto are directed to ascertain from the records the exact amount of reparation due under this order and to communicate the same to the Department. *Jurisdiction is hereby reserved by the Department to enter a further order, requiring the payment of reparation by respondent to complainant in the sum agreed on by the parties, or, if the parties are unable to agree then in such sum as the Department may find is in fact due;* and to make such other and further orders as are necessary in the premises." Tr. 92. No agreement was reached *and no further order made.*

The findings, Exhibit 1, Tr. 75, contain much extraneous matter, consisting of a discussion of the testimony, statements of contentions of the parties, citations of decisions and statutes, etc., not findings of *fact* made prima facie evidence. The findings were admitted in full over appellant's general and special objections to each irrelevant portion. Tr. 94.

The basis for the Department's order is that Sec. 10350, quoted in the findings, Tr. 87, requires that all rules which effect the charges shall be published in the tariff, and states "that it appears inconceivable that the railway company should fail during all these years in its duty under the law" to publish the rules. It follows with the statement that:

"The railway company has every right under the law to publish its log tariff upon whatever basis it chooses; whether it be upon a weight basis or a footage, using the gross scale or something different from or less than the gross scale. " * * *

"In the absence of any scaling rule in its schedule, and in view of the ambiguity of the term 'board measure' as applied in the schedule, it appears that the Department has but one question to determine."

It states this question to be, whether the logging company is entitled under the applicable schedule to have the logs scaled by the rule used for "their *sale and purchase* in Western Washington." It answers the question by citing decisions of the I. C. Commission to the point that ambiguous tariffs are construed against their author. So construed, it holds shippers entitled to the commercial scale.

We emphazize that the award is based solely upon the ground that appellant's scaling rule was not published in tariff form. Had the rule been published it would have been binding.

Appellant reviewed the order in the Superior Court where it was reversed. Appellee appealed. The Supreme Court reversed the Superior Court. It observes that the railroad scaling rule never became a part of Tariff 51, implying that the statute so requires. It followed the Department's rule of construction of ambiguous documents and states:

"Since Tariff No. 51 does not define what is meant by board measure, and since the method of scaling adopted by the scaling bureau is the one recognized commercially, *it cannot be said that the Department acted arbitrarily or capriciously* in the construction which it placed upon the tariff."

The court exercised no independent judgment of its own. The opinion concludes:

"The judgment appealed from is reversed and the cause remanded with directions to the superior court to enter judgment *sustaining the order of the Department of Public Works.*"

The court rendered no final judgment. (See *Campbell River Mills* case). It exercised no *independent judgment of its own* as to the meaning of the tariff; did not discuss the applicable rules of construction; and, in short, did not pass on the questions raised on this appeal.

It is unnecessary to further notice the State Supreme Court's decision because it adds nothing to the statutory effect of the Department's findings as "prima facie evidence of the facts therein stated," as provided by Sec. 10433. *C. M. St. P. & P. R. Co. v. Campbell River Mills*, 53 Fed. (2) 69, (C. C. A. 9th C); *Southern Pacific R. Co. v Van Hoosear*, 72 Fed. (2) 903, (C. C. A. 9th C).

The following is a recapitulation of the points argued in appellant's brief with citation of authorities prepared as directed by the court:

ARGUMENT

POINT I — Appellee not entitled to recover under the undisputed evidence.

This proposition is based on eight separate contentions, which will be summarized in the same order presented in the opening brief.

The construction of a tariff presents a question of law for the court where, as here, the controlling facts are not in question. (Brief 122-125.)

(1) **Tariff 51 not ambiguous.** (Brief 125-137.)

The trial court instructed the jury that the tariff is ambiguous. (Assignment 55). If it be not, appellee has no case.

The meaning of board foot and board measure is as free from doubt as "yard," "bushel," "rod," "pound," "acre," and like terms. Appellee's contention is that the terms are ambiguous only because certain loggers in the Puget Sound area use the commercial rule. Such a trade custom among buyers and sellers of logs is not binding on those not engaged in that trade:

Great Western Elevator Co. v. White, 118 Fed. 406.

(2) **Assuming Tariff 51 ambiguous, undisputed evidence that appellee's interpretation gives tariff unreasonable construction and fails to give effect to all its provisions, requires rejection of that interpretation.** (Brief 137-146.)

This rule for the interpretation of ambiguous tariffs has been frequently recognized:

Great Northern Ry. Co. v. Delmar, 283 U. S. 686; *Andrew Murphy v. Ann Arbor Co.,* 147 I. C. C. 449; *General Motors v. G. T. W. Ry. Co.,* 118 I. C. C. 99, 104.

Item 50 calls for "the *actual* number of feet of logs on each car." Cleveland, Tr. 214, testified:

"Rule 50 as applied to the application of the rates quoted in cents per thousand feet, board measure, under the tariff required the full and actual number of feet board measure to be used in computing freight rates. Rule 50 does not provide a different measure for the freight rate where the shipper scales the logs instead of a railroad scaler."

The bureau scale does not give the *actual* number of board feet. It rejects entirely 1,627,890 feet of

wood logs. Giving effect to all the items in the tariff, it means that freight charges should be reckoned on the *actual* number of board feet transported without deductions for defects, especially wood logs and crooked timber.

(3) **If otherwise doubtful, the practical construction placed by the shippers, including appellee, and the railroad company for a generation past, is conclusive of its meaning.** (Brief 146.)

Berwind-White Coal Min. Co. v. Chicago & E. R. Co., 235 U. S. 371, 59 L. Ed. 275; *Adams v. Mills, Director General*, 286 U. S. 397, 76 L. Ed. 1184; *Minneapolis etc. R. Co. v. Van Dusen*, 272 F. 255. The Commission has repeatedly so held. See 152 I. C. C. 389 and cases cited in the brief at page 151.

The evidence is undisputed that since 1906 appellant has used the scaling rule quoted at page 2 of this brief. Appellee's witness and officer, Irving, has been shipping and paying freight on logs so scaled during the entire period and with full knowledge. See Tr. 282, where he states that "I have accused the Northern Pacific of cheating me for twenty years." And again, "I began to be overcharged by the Northern Pacific when the legal department took charge of it about 1924 * * * We had to pay the bills but hollered like a white steer all the time." He admits that he took no legal action prior to 1927. His claim that the Great Northern and Milwaukee used the bureau method, even if material, relates to a period long before joint tariff 51 was promulgated. His and Frost's testimony as to the practice of other railroads, cannot be accepted because it is admitted that Mr. Frost, him-

self, and other shippers brought *identical suits against both the Great Northern and Milwaukee under Tariff* 51, (Tr. 263). Appellee's President, Jamison, admits knowledge of the scaling rule by the correspondence Ex. A-18 and Ex. A-19, Tr. 156-158. He claims only the difference between the bureau scale *plus deductions* and the railroad scale, "and 50% scale on cull logs." "We wish," says Mr. Jamison, "to be fair and reasonable in this matter and *are not asking the railroad to haul something for nothing*," (Tr. 159). The claim was settled on the basis of bureau scale plus *all deductions* and *plus full scale on the culls.* (Mitchell, Tr. 157). That is, *by appellant's scaling rule.*

The evidence was undisputed that log shippers, including appellee, had shipped millions of cars of logs and paid tens of millions of dollars in freight charges over a generation *with full knowledge that appellant never did make deductions for defects affecting merchantability*, and, especially, *never carried cull logs free of charge.* The scaling bureau was an instrumentality of the loggers not even in existence prior to *1913.* The method of scaling between buyer and seller is within their control. By increasing allowance for defects and changing definition of culls, *buyer and seller can fix the charge.* The seller could protect himself by increasing the price of what was left. Evidence was offered that this is exactly what they did under the N. R. A., by providing that a log which did not contain 50% of good lumber would be a cull in-

stead of 33% under the rule in effect in 1926. So with the defects for which deductions would be made and the amount thereof. *By the rule followed in this case appellant's freight charges are taken from its control and placed under the absolute control of the shippers.* The price of logs could be adjusted to any method of scaling buyer and seller might adopt.

(4) **Assuming Tariff 51 ambiguous, undisputed evidence that appellee's interpretation makes tariff illegal, requires rejection of that interpretation.** (See brief 159-172.)

The leading case is *Great Northern Ry. Co. v. Delmar Co.*, 283 U. S. 686. The rule has been followed in many other cases cited on page 165 of our opening brief. Appellee's interpretation results in illegality in three respects: (a) confiscation; (b) discrimination; and (c) free carriage.

(a) *Appellee's interpretation of the tariff renders it confiscatory.*

A cost study of log transportation under Tariff 51 and of the particular movement in question was offered and rejected (Assignment 25); also a comparison of car mile earnings of saw logs with other lowest rated commodities (Assignment 38). This evidence proves that use of the bureau scale deprives appellant of a just return for its service. See brief page 166.

Appellee presents two answers in addition to the usual argument that the Supreme Court decision is conclusive:

(1) This is not a rate making proceeding; and,

(2) The tariff is joint and confiscation was not shown as to all the carriers.

(1) While this is not a rate making proceeding the evidence is admissible as an *aid to interpretation* of an alleged ambiguous tariff; and,

(2) The effect on some other carrier is irrelevant. *Minnesota Rate Cases*, 230 U. S. 352; *Aetna v. Hyde*, 275 U. S. 440.

(b) *Appellee's interpretation of tariff renders it discriminatory.* Brief 168.

The tariff is applicable to all parts of Western Washington, but the commercial rule in the Grays Harbor and Columbia River areas differs from the rule used in the Puget Sound area. The tariff must mean the same in the entire area to which it is applicable; otherwise, it is discriminatory and unlawful under Rem. Rev. Stat. Sec. 10357.

(c) *Appellee's interpretation of tariff requires free carriage, contrary to Sec.* 10354 *and the* 14*th Amendment.* Brief 170.

We have shown that by the bureau scale appellant is allowed no freight on wood logs, to say nothing of the defective material. *Appellee, itself, loaded this material and tendered it for transportation.* Appellant was obliged to render the service. Where timber happens to be defective the carrier might collect only for the 6000 ft. minimum while carrying twice that amount. It may receive only *half as much* for some cars as for others, though the *transportation service is identical.*

(5) **Appellee has waived or is estopped to make claim for reparation.** (See brief p. 172.)

Appellee and the other log shippers, with full knowledge, have acquiesced in the application of appellant's scaling rule for a generation. They have shipped millions of cars of logs and paid tens of millions of dollars in freight charges computed by appellant's rule. They did not claim that identical tariffs contemplated the commercial scale, nor that appellant's tariffs were unlawful because the scaling rule was not published therein. The Department of Public Works never took that position. Appellee, in the instant case, paid freight charges during 1926 without objection. It was its duty to make prompt objection so that appellant could correct the informality in the tariff, if it was informal. Instead, appellee remained silent until its pretended claims had accrued when it was too late for appellant to protect itself by publishing the rule. Thus it caught appellant in a concealed trap. The undisputed evidence proves equitable estoppel or waiver. To hold otherwise is to permit unmerited enrichment of appellee and injustice to appellant by depriving it of the admittedly reasonable charges collected. See *Atlantic Coast Line v. Florida*, 79 L. Ed. 719. This is a clear case of deliberate entrapment.

(6) **Appellee cannot recover even under the Department's construction of the tariff because it paid only a reasonable charge and therefore was not damaged.** (See brief 181 et seq.)

Atlantic Coast Line R. Co. v. Florida, 79 L. Ed. 719 is directly in point. There the Supreme Court

holds that restitution of charges in excess of the lawfully published rate will not be awarded where the charges collected were just and reasonable and the carrier is excusable for not making effective in tariff form the reasonable charge to which it is entitled. This decision is made over the objection that it *denies effect to state statutes in violation of the federal constitution.* (See Justice Roberts' dissent.) This is the first case so holding under Sec. 6, although forshadowed by such cases as *Davis v. Portland Seed Co.*, 264 U. S. 403, holding that proof of damage is necessary to recovery for violation of the 4th section; *Arizona Grocery Co. v. A. T. & S. F.*, 284 U. S. 370, denying reparation for unreasonable charges collected under a tariff prescribed by the Commission; *Great Northern v. Delmar*, 238 U. S. 686, reversing a long line of commission decisions awarding reparation in the so-called alternate and circuitous route cases; and *Great Northern v. Sullivan*, 79 L. Ed. 507, decided March 4, 1935, denying reparation for an unreasonable proportional rate *in plain violation of Section 1*, because the *combination* rate paid was not excessive, and, therefore, *the shipper had not been damaged.* Then follows the Florida case. The tendency of the Supreme Court to deny reparation for violation by an interstate carrier of the interstate and *state* acts is increasingly manifest since enactment of Transportation Act, 1920, by which the United States assumes almost full responsibility for the interstate transportation system. The Interstate Commerce

Commission has, for many years, frowned on claims for reparation without damage, repeatedly recommending to Congress amendments to that effect; hardly concealing its opinion that such claims had degenerated into a form of legalized racketeering which should be ended. In the 33d Annual Report to Congress, page 19, the Commission states:

"The law, might well affirmatively recognize that *private damages* do not necessarily follow a *violation of the act*, and provide that sections 8, 9 and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage."

The Supreme Court has, by construction of the act, now made this amendment unnecessary.

Appellee seeks to distinguish the Florida case on the ground that it was in equity, whereas this case is at law. But the court holds that the rule applies "*though the action to which it is an incident were triable in a court of law.*" The case at bar was docketed on the equity side and removed to the law side on appellee's motion, on the ground that the equitable defenses are available on the law side. (See Petition Tr. 39; Order Tr. 57). If appellee erroneously caused transfer to the law side, he is not thereby entitled to a recovery which he could not obtain on the equity side. He is estopped. The equities in the case at bar are far stronger than in the Florida case. The administrative construction given to the statute as not requiring publication of the scaling rules, discussed at page 200 of our brief, and the acquiescence of the shippers, including appellee, for a generation

during which they paid freight computed under our rules without objection that they were not published, justified appellant in believing that the tariff and rule were lawful. When, for the first time, the scaling rule was challenged in this proceeding because not published, and the Department refused to give it effect for that reason, appellant immediately filed its rule, the shippers objected, it was suspended and canceled on a technicality and the order was affirmed. See *North Pacific Coast Freight Bureau v. Department*, 156 Wash. 137; Berger's test. Tr. 274; Cleveland, Tr. 233. Appellant then filed Tariff 51-B, also publishing the scaling rule, which was also attacked by the shippers, suspended and cancelled by the Department and made effective by the judgment of the District Court in *N. P. Ry. v. Baker*, 3 Fed. Supp. 1. See offer of proof, Tr. 142. Thus, it is that appellee has an award of reparation in this case, and it and other log shippers are claiming enormous sums from appellant—enough to threaten solvency—covering the period 1926 to date of decree in the Baker case, March 26, 1933, on the sole ground that the scaling rules were not published in tariff form, *the very thing the shippers did their best to prevent*, and successfully too, until defeated by the judgment of the District Court in the Baker case. Could conduct be more inequitable; could a result be more unjust? We submit that appellee's case is no better founded in point of morals than in law.

Appellee's only claim of equity is that some other carriers use the commercial rule; that it is discrim-

inated against. This it says in face of admitted fact that *other shippers have identical claims against those other carriers.* Tr. 262. However, appellant is not chargeable with discrimination for what is done by other carriers. See *Central R. Co. of New Jersey v. United States*, 257 U. S. 247, directly in point.

(7) **Appellant's scaling rules are binding even though unpublished.** (Brief 192.)

Rules governing ascertainment of quantity, etc., need not be published. Weighing rules need not under Sec. 6 of the Commerce Act adopted as Sec. 10350.

Becker v. N. P. Ry. Co., 93 I. C. C. 368; *Gentile Co. v. Tidewater So. R. Co.*, 140 I. C. C. 621. In *P. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, a carrier was held liable for disregarding its unpublished car service rule. See *especially Detroit etc. R. Co. v. I. C. C.*, 167 U. S. 633.

Scaling rules need not be published under the administrative construction of the statute. (Brief page 200).

For over a generation log tariffs have been accepted by the Department without scaling rules. The Department, itself, has prescribed tariffs in log rate cases without scaling rules. (Exhibit A-26, Tr. 206). Most of this evidence was rejected. (Assignments 34, 26). Construction of a statute by a tribunal charged with its administration, where long continued, is most persuasive. *North Pacific Coast Freight Bureau v. Department*, 156 Wash. 137, holds that if a tariff be in improper form, "it was not only within

the power of the department, but it was its *duty* as well, to dismiss the proceeding and cancel or order cancelled the tariff." Therefore, by accepting the tariff without scaling rules the Department approved its form.

The belated construction of Sec. 10350 convicts the Department of gross negligence and appellant of violating the law millions of times. It is therefore inadmissible. The administrative construction is conclusive. *Central R. Co. of New Jersey v. Martin*, 175 Atl. 637, and cases cited.

Brinkerhoff v. Hill, 281 U. S. 673, holds that reversal, with retroactive effect, of an interpretation of a statute under analogous circumstances denies due process.

(8) **The settlement of September 24, 1925, (Long-Woodworth Agreement) bars appellant's claim.** (Brief 212-243.)

Paragraph XII of the answer, (Tr. 29), pleads this defense. (The agreement is Exhibit A-25, Tr. 180). Tariff 51 was published pursuant thereto. Appellant refunded $183,841.92 to appellee and other log shippers. *The amount was calculated by our own scaling method.* It was understood that there was to be no change therein in appellant's scaling rule.

Validity of the agreement is sustained in many cases, especially *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U. S. 353. Compare *N. P. R. Co. v. St. Paul & Tacoma Lumber Co.*, 4 Fed. (2) 359, (9 C. C. A.).

The cases hold that such an agreement is binding until set aside in a direct proceeding. This case is

not such a proceeding. On the contrary, *appellee relied on the Long-Woodworth agreement before the Department*, while now saying it is invalid. See Finding 14, Tr. 82-83. The court struck this defense. See Assignment 40.

POINT II— (1) **The Department's findings are not admissible and do not make a prima facie case.** (Brief 243.)

If this contention be rejected, then,

(2) **The Department's findings are inadmissible because arguments, deductions, statements of law and statements of fact are inextricably commingled therein.**

If this contention be rejected, then,

(3) **It was the duty of the court to separate the findings of fact from statements of contentions, arguments, law, etc., and admit only the findings of fact.**

Western New York & P. R. Co. v. Penn Refining Co., 137 Fed. 343, (3 C. C. A.), affirmed; *Lehigh Valley R. Co. v. Meeker*, 211 Fed. 785, (3 C. C. A.); *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; *Great Northern R. Co. v Department*, 161 Wash. 29, 296 Pac. 142.

Many statements in Exhibit 1 (Tr. 75-93), are not findings of *fact*. The 7th amendment, guaranteeing a jury trial, requires the court to exclude all but the findings of *fact*. Assignments 4 to 22 present this point. Assignments 61 to 84, inclusive, and 94, 95, 99, 100-105, inclusive, are to refusal to give specific instructions excluding the improper matter.

The court's instruction was inadequate under the cited cases (Assignment 54). The improper portions

of the findings were effectively used by appellee in the jury argument. (Tr. 296-297, 302.)

POINT III — Admission of evidence of scaling practice of Great Northern and Milwaukee was error. (Brief 299 et seq.)

Testimony was admitted over the objection that Milwaukee Railroad, between 1913 and 1922, accepted a shipper's scale which deducted for defects, and that the Great Northern did likewise from 1920 to 1926, inclusive, (Assignments 41, 43, 45). The Milwaukee's practice between 1913 and 1922 was too remote. Besides, it was not then operating under Tariff 51. There is no requirement of law that all railroads have the same rates, rules and regulations. The lawfulness of rates and rules depends on the circumstances of the *railroad which uses them.* A rate or rule may be valid as to some railroads and invalid as to others, depending upon the facts peculiar to each. Prior to Tariff 51, each railroad had its own tariff and published its own rates (essentially different), and had its own scaling practice. The evidence shows, for instance, that Great Northern's rates were higher than appellant's. See appellee's witness, Berger, Tr. 276. See *Minnesota Rate Cases*, 230 U. S. 352; *Aetna v. Hyde*, 275 U. S. 440 to the point that identical rates and rules may be reasonable as applied to one carrier and unreasonable as applied to another, depending upon the circumstances of each. And to the point that one carrier cannot be charged with violation of law because of what is done by another carrier, see *Central R. Co. of New Jersey v. U. S.*, 257

U. S. 247. Appellant did not offer evidence as to the practice of other carriers. If it had, this case would have been prolonged indefinitely. *A complete answer is that it is admitted that shippers on the Great Northern and Milwaukee have brought against those carriers identical claims.* Appellee's witness, Frost, states: "We filed a suit against the Great Northern. It was partially based on the proposition that *its scale was in excess of the commercial scale.*" (Tr. 263). This certainly proves that at, or very shortly after, the time that Tariff 51 took effect, the Great Northern *discontinued* using the commercial scale, even if it ever had used it. This seemed then, and does now, a sufficient answer on the issue of fact. This inadmissible testimony was effectively used in appellee's argument to the jury. (Tr. 290, 303; Assignments 50, 52).

POINT IV — Instructions. (See Brief 309-347.)

(1) **Effect of Findings.** (Brief 311.)

The trial court, in substance, instructed that the findings of the Department were to be *weighed as evidence* instead of instructing that they merely *shift the burden of going forward with the evidence.*

Jones on Evidence, Sec. 8e (7); *Tift v. Southern Ry. Co.*, 138 Fed. 753, 148 Fed. 1021, 206 U. S. 428; and cases cited appellant's brief 314.

Requested instructions in accordance with the rule announced by the cited cases were submitted and refused. (Assignments 79, 80, 94, 95, 99, 100-105, 114).

(2) **Effect of Proceedings in state courts.** (Brief 320.)

Although the decision of the Supreme Court on review was not admitted, the court refused to instruct, as requested, that the effect of the findings and order were not enhanced thereby. (Assignments 80-85). The prejudice of this error was emphasized by argument of appellee to the jury, (Tr. 296, 298, 302), *that its contentions had been sustained by the Supreme Court.* (Assignments 49, 51).

(3) **Rules for Interpretation of Tariffs.** (Brief 331.)

Assignment 55 presents the error of the peremptory instruction that board measure is ambiguous, and Assignment 56 the error of the peremptory instruction that the commercial method of scaling should have been used. Assignments 87-94 complain of the refusal of the court to instruct on the various rules for interpretation of tariffs.

POINT V — The Court Erred in Striking the Counterclaim and Plea of Estoppel, (Paragraph XII of Answer), and in Rejecting All Evidence in Support Thereof. (See brief, 347-348.)

POINT VI — Free Carriage Is Illegal. (See Brief, 348-349.)

Limitations of space do not permit argument of these points additional to the references hereinabove.

POINT VII — Error to Admit Conclusion of Witness As to Evidence Before Department. (See Brief, 349-352.)

The court permitted Mr. Irving to testify that the same evidence was before the Department as was before the jury. (Tr. 281-282, Assignment 48). Evidence before the Department was not admissible under any circumstances.

The importance of this assignment is in the fact that the findings of the Department were before the jury, and the answer to this question advised the jury that *on the same evidence* the Department(and the Supreme Court) ruled favorably to appellee. This error was emphasized by appellee's argument to the jury that the Supreme Court on the *merits* affirmed the Department. (Assignments 49, 51). The answer was a mere conclusion and most prejudicial, especially as used in argument.

POINT VIII — The Court Erred in Denying Defendant's Motion to Dismiss for Want of Jurisdiction Because the Order Lacks Finality. (See Brief, 352-376.)

Belcher v. Tacoma Eastern R. Co., 99 Wash. 34, 45, holds that the reparation order must be final, fixing the amount due, else, " * * * the Superior Court did not have jurisdiction in the first instance * * * "

The jurisdiction of this court is derivative and if the state court had no jurisdiction this court has none. We deny that appellant recognized the order as final. But even so, jurisdiction cannot be given by waiver. See *C. M. St. P. & P. R. Co. v. Adams Co.*, 72 Fed. (2) 816, C. C. A. 9th C. There was a similar review in the state court of an interlocutory order in the *Campbell River Mills* case, *supra*, but before filing suit on the award plaintiff obtained a final order.

POINT IX — The court erred in denying defendant's motion to dismiss for want of jurisdiction because the Department was disqualified under the due process clause of the 14th amendment, as alleged in Paragraph XIV of the answer. (Brief 373-392.)

This assignment, (No. 2), is supported by *Tumey v. Ohio*, 273 U. S. 510, holding that a tribunal having

a substantial pecuniary *official* interest in the decision adverse to a party is disqualified. Appellee relies on *Dugan v. Ohio*, 277 U. S. 61. The Dugan case approves the Tumey case, but distinguishes it on the ground that the Mayor, as *Mayor*, had only *judicial* duties; and, as one of five members of the city commission, his relation to the *executive* and *financial* policy of the city was remote. But the members of the Department are in complete charge of all its activities and solely responsible for financial results of its operations.

The Department's order, on review, carried a presumption of correctness. Under this presumption the Supreme Court said it could not hold that the Department had acted arbitrarily or capriciously. It exercised no independent judgment of its own. Compare *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287. We insist there is a denial of due process. We protest with all possible emphasis against the use of the findings and order to appellant's prejudice. Especially do we protest against appellee's assertion that the order is final and conclusive.

POINT X — The court erred in denying defendant's motion for dismissal; or, in the alternative, in refusing to sustain defendant's oral demurrer; or, in the alternative, in refusing to grant defendant's motion for a stay of proceedings, which motions and demurrer were based upon the fact that there has been a splitting of a single cause of action by plaintiff and that there is an absence of an indispensable party plaintiff. (Brief 392-406.)

This is Assignment 3. It is not necessary to decide this point if the court holds that the order is void because of the pecuniary official interest of the

Department, or because the order is not final, as above argued. An action to recover the award is, we believe, maintainable by the Department as well under Sec. 10450, providing that the Department has the duty to enforce the law, as because of its pecuniary official interest. Appellee argues that it is the only party in interest. Even if the Department has only an official pecuniary interest it has a legal interest in the discharge of its duties analogous to that of the county treasurers in a tax case, who were held to be necessary parties in *C. M. St. P. R. Co. v. Adams County*, 72 Fed. (2) 816, by this court. How the merits of the Department's claim may be decided is beside the question. If it has capacity to sue, it is entitled to be heard. We feel under a duty to say to this court that, since the argument, the State of Washington ex rel. Department has brought an "ancillary" suit in the district court at Seattle, in which appellant and appellee are defendants, for a decree that the money be paid to it for disbursement under said Sec. 10436. As the suit is ancillary and effects the subject matter of the case at bar, it seems this court would take judicial notice of the filing of the suit in the district court. *Hennessy v. Tacoma Smelting & R. Co.*, 129 Fed. 40 (C. C. A. 9).

We respectfully submit that the judgment should be reversed and the case dismissed.

Respectfully submitted,

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Attorneys for Appellant.

4

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

Upon Appeal and Cross-Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Summary of Brief of Appellee and Cross-Appellant

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Summary of Brief of Appellee and Cross-Appellant

I.

FACTS

We first correct and supplement appellant's statement of the case in four important groups of facts. (Br. 4-11).

II.

We next set out the verbatim opinion of the Supreme Court of Washington, (p. 11), being the last (and only) expression of that court on the question of how to inter-

pret an ambiguous term in a rate tariff in which the rule is announced after an examination of I. C. C. authorities (p. 14):

> "In interpreting the tariff, the terms used, when they are not defined therein, should be taken in the sense in which they are generally understood commercially."

This *rule* as distinguished from the *application* thereof to the facts as they appeared in the record made before the Department of Public Works, is not only persuasive but, we submit, binding in a subsequent suit involving the interpretation of an ambiguous term in a tariff. The *application* of the rule is not *res adjudicata,* for new evidence may be introduced before the trial court in a suit to recover the amount awarded. It is for the trial court to instruct the jury as to what the rule is, and to direct the jury to *apply* the rule to the facts as they find them from the evidence. But in determining what the rule is, the trial court may properly look to what the Supreme Court of Washington says the rule is and adopt that as the rule to be applied by the jury.

The case of *C. M. & St. P. & C. R. Co. v. Campbell River Mills,* 53 Fed. (2d) 69, merely held that the *application* of an unambiguous rate tariff was not *res adjudicata* in a suit to recover the amount of the award of the Department of Public Works. This was clearly correct, because the trial court had a right to receive evidence *de novo,* and the *application* of the tariff made by the Department and the Supreme Court of Washington to the facts as they appeared before the Department would not necessarily be the same as the *application* of the tariff to the facts as they appeared before the trial court. The tariff in that case was unambiguous and presented no question as to the meaning of the tariff rate. It presented only the question of the application of a tariff rate of known meaning. The case did not hold that the federal court should not be required to look to the rule of the state

in ascertaining the meaning of an intrastate tariff. (See Br. 17, 60-68, 78, 175).

III.

BRIEF OF ANSWERING ARGUMENT

This summary parallels pages 18-27 of our brief.

Answer to Point No. 1

Appellant contends that appellee is not entitled to recover under the undisputed evidence. This is argued under eight heads. None of the arguments are supported by authority in point. We shall discuss each in turn.

A. Appellant contends tariff 51 is not subject to construction. We contend (Br. 19):

(1). That it is under the law of Washington. The Department charged with the duty of determining the meaning of the tariff found after evidence that the term board measure was a trade term, and the Supreme Court agreed that the Department's action was lawful and reasonable. Rem. Rev. Stat. 10450, 10448; *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691.

In this respect a tariff is like a statute and a construction thereof is part of the tariff. *Pennsylvania R. Co. v. International Coal Co.,* 230 U. S. 184, 197; *Marine National Exchange Bank v. Kalt-Zinmer Mfg. Co.,* 55 S. Ct. 226.

(2). The term "board measure" is a trade term in the logging industry, as shown by the evidence, and therefore subject to a showing of what the trade meaning of that term is. *Paepcke-Leicht Lumber Co. v. Talley,* 153 S. W. (Ark.) 833. See also *Union Wire Rope Corp v. Atchison, etc. Ry. Co.,* 66 F. (2d) 965.

B. Appellant contends the commercial interpretation fails to give effect to all terms of the tariff. We contend (Br. 19):

(1). That if board measure is a trade term, trade mean-

ing must be given to that term in accordance with the rule of law announced by the Supreme Court of Washington. (See Br. 17, 60-68, 78, 175).

The Washington court, in announcing the rule of law in that case, was acting judicially to determine the "reasonableness" and "lawfulness" of the findings and order.

> *Willapa Power Co. v. Public Service Commission,* 110 Wash. 193, 195; *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29; *Bacon v. Rutland R. Co.,* 232 U. S. 134, 34 S. Ct. 283.

Having found that the rule as applied by the Department was in accordance with law, it necessarily followed that the Departmental application was not arbitrary.

(2). But in any event, the commercial interpretation of the term board measure does give effect to all terms of the tariff. The Northern Pacific's interpretation would read out of the tariff the term "board measure." Tariff 51, Item No. 50, dealing with scaling (App. Br. 3), which requires the shipper, where logs are not scaled by the carrier, to furnish the railway agent "a certificate showing the actual number of feet of logs on each car," means the actual number of feet of logs on each car for which freight charges are to be computed. We must therefore look to the column headed "Rates in Cents per Thousand Feet," intended by the carriers to comply with the Long-Wood-worth agreement which uses the phrase "Rates in Cents per Thousand Feet Board Measure." (Tr. 23, 180). Item 40 deals with minimum loads of "6,000 feet board measure."

Appellant's interpretation would read out of tariff 51 the trade term board measure, whereas department's interpretation gives effect thereto and reasonable effect to Item 50.

C. Appellant contends the parties by practical construction have accepted the Northern Pacific scale, and

that it is the conclusive and governing scale. We contend, (Br. 19):

(1). If tariff 51 calls for a commercial scale, the practical construction of the parties is irrelevant.

(2). However, the evidence shows no such practical construction, not only because tariff 51 was filed for the first time on October 1, 1925, but also because practical construction of that tariff was not uniform on the part of the carriers themselves. It was a joint tariff and the Milwaukee and Great Northern railways parties to that tariff, construed it as calling for the commercial scale. Furthermore, even if the construction were uniform on the part of the carriers, it would be ineffective unless acquiesced in by the shippers, as shown by the authorities cited in appellant's brief 147-154. The evidence shows no such acquiescence. On the contrary, the evidence shows that the shipper on the other carriers received the benefit of the commercial scale, and the Sauk River Lumber Company did not even know that the Northern Pacific was construing tariff 51 the way it did until after the year 1926, when it promptly brought suit before the Department. (Br. 89).

(3). Furthermore, the Northern Pacific's practical construction is ineffective because it would result in discrimination under the same joint tariff, since shippers on the Northern Pacific would get one kind of treatment and shippers on the other carriers would get more favorable treatment. See, Rem. Rev. Stat. 10354, 10356.

(4). In any event, practical construction by one party to the tariff would at most be merely an aid to interpretation, and would not require dismissal of this suit as appellant's own authorities show, (App. Br. p. 152).

D. Appellant contends the commercial interpretation makes tariff 51 illegal in that it permits confiscation, discrimination and free carriage. We contend (Br. 20):

(1). That the carrier takes the risk of interpretation of

a voluntarily filed tariff. See *Pennsylvania Fire Insurance Co. v. Gold Issue, etc. Co.,* 243 U. S. 93, 37 S. Ct. 344. And since the rule is that ambiguous terms in a tariff should be interpreted in their commercially understood sense, the objection raised is unavailing as to a voluntarily filed tariff.

(2). In any event, the question of the sufficiency of rates is irrelevant in this reparation proceeding. *Northern Pacific Ry. Co. v. Sauk River Lumber Co.,* 160 Wash. 691; *State ex rel v. Department of Public Works,* 149 Wash. 129, 134; *Robinson v. Wolverton Auto Bus Co.,* 163 Wash. 160, 163; *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696; *Mellon v. Johnson Co.,* 219 N. W. (Wis.) 352, 353.

(3). Furthermore, evidence as to the effect of the commercial interpretation on the Northern Pacific alone, without being coupled with an offer to show that the same is true as to other party carriers to tariff 51, would be inadmissible because even if it were true as to Northern Pacific and not shown to be true as to the others, the Northern Pacific would not be entitled to one kind of scaling practice under tariff 51, while the other carriers were required to use another, since the tariff is joint and not several, and means the same for all parties to it.

(4). In any event, there is no discrimination resulting from the commercial scale, on the theory that different commercial scales are used in different logging districts, (Br. 97). The evidence is that the commercial method of making deductions is the same in all districts. The only difference in the districts is the method of measuring the gross content, which methods result in a small difference, (Br. 4-6). The commercial method of interpreting tariff 51 involves the uniform use of the Scribner Decimal "C" Stick. Hence the carrier will use the same stick in all the logging districts, and the same deductions will be made for the same defects in all the logging districts with the

result that there will be uniformity and not discrimination in the application of tariff 51, as held in *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, (Br. 14).

(5). Finally, it is conclusively presumed in this proceeding that the rates are sufficient and that there is no free carriage in fact no matter what the form may be. It is not necessary to compute freight upon the basis of every item carried in order to constitute a full charge. It is sufficient, if freight is calculated on the basis of certain units in contemplation of the fact that it must be at a sufficiently high figure to cover other units that will not be counted for the purpose of assessing the total freight charge. (Br. 95). In fact, the so-called free carriage of cull logs is almost wholly offset by the pay the railway receives for minimum car loads, even in cases where the minimum is not loaded. Thus in the case at bar the shipper has paid to the carrier the sum of $3,671.78 to make up minimum for logs not shipped as compared with the sum of $4,069.73 which appellant contends should have been paid for cull logs.

E. Appellant contends the shipper has waived or is estopped to obtain reparation (Br. 20):

(1). Because appellee failed to call carrier's attention to the fact that it was using the wrong scale. But:

(a). This estoppel isn't pleaded, and therefore is unavailable. *Walker v. Baxter,* 6 Wash. 244.

(b). Nor is there any evidence to support this claimed estoppel, because the testimony is that the shipper did not know that the carrier was using any but the commercial scale. (Br. 7, 101).

(c). No such estoppel, at any rate, is available because the parties dealt at arm's length, both being charged with knowledge of the law. *Jordon v. Corbin Coals, Ltd.,* 162 Wash. 503; *Turner v. Spokane County,* 150 Wash. 524.

Just as a carrier is not estopped from insisting upon its filed rate even though it has charged less than that rate, as, for example, by misquoting the rate, (*Mellon v. Johnson Co.*, 219 N. W. (Wis.) 352), so it would seem that the same public policy requires that the shipper be not estopped from asserting the filed rate.

(2). Appellant predicates estoppel under the Long-Woodworth Agreement.

(a). However, there is no proof that that agreement provided for the Northern Pacific scale. On the contrary, the proof it that the scaling practices were not discussed and that Mr. Long did not even know of the Northern Pacific scaling practice, and must have assumed that the commercial scaling practice with which he was undoubtedly familiar and which was charged by the Chicago, Milwaukee would be the one that would govern. (Br. 115-117). Furthermore, the Great Northern and (by inference) other carriers used the commercial scale after the agreement and after tariff 51.

(b). In any event, however, that agreement, if different from the subsequently filed tariff 51, was avoided by that tariff becoming effective. Such an avoidance would necessarily be contemplated in the contract itself, since a carrier cannot by contract insist upon its terms contrary to subsequently filed tariff which, upon filing, becomes the govering tariff. *Armour Packing Co. v. United States,* 209 U. S. 56, 28 S. C. R. 428.

Such a voidable contract cannot be the basis of estoppel, not only because contract is not absolute but also because to utilize estoppel under such circumstances would be to give effect to the contract and not to the filed rate.

See *Melody v. Great Northern Ry. Co.,* 127 N. W. (S. D.) 543.

F. Appellant contends that the shipper cannot recover

unless the rates are unreasonable to the shipper's damage. We contend, however (Br. 21):

(1). That the Washington statutes do not require proof of damage other than that of overcharge. See R. R. S. 10433.

(2). Appellant's authorities deal not with overcharge cases, but with reparation suits involving the violation of the long and short haul provisions of the I. C. C. and the statutes forbidding discrimination. In overcharge cases, it is necessary to prove only the fact of overcharge and nothing else. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U. S. 531, 38 S. Ct. 186; *Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 17, 46 S. Ct. 73, 79.

G. 1. Appellant contends that its unpublished scaling rules are binding, but we contend (Br. 21):

(1). That such unpublished scaling rules are ineffective to change the meaning of board measure, which is published in a tariff. If board measure means something other than its commercial meaning, the carrier must publish that meaning.

(2). An unpublished scaling rule, however, is void. (R. R. S. 10350, 10354). *Clark v. Southern Railway Co.,* 119 N. E. (Ind.) 539, 542; *Vanderberg v. Detroit & C. Nav. Co.,* 186 N. W. (Mich.) 477, 478; *Macfadden v. Alabama Great Southern R. Co.,* 241 F. 562; *Suffern Hunt & Co. v. Indiana, Decatur & Western R Co.* 7 I. C. C. 255; *In re Alleged Unlawful Charges,* 8 I. C. C. 585.

(3). The Northern Pacific's unpublished scaling rules would not be binding unless there was proof that the other carrier parties to the tariff used the same unpublished scaling rules. Thus the evidence shows that they use the commercial scaling method. The tariff being *joint,* it would be improper to permit the Northern Pacific to apply one scale and the other carriers to apply a different scale.

(4). Finally, the unpublished scaling rule being contrary to the meaning of board measure, would naturally be ineffective since contrary to the filed tariff.

G. 2. Apellant finally contends that its unpublished scaling rules are binding under the administrative construction of the statutes, (Rem. Rev. Stat. 10350-10354, requiring rules to be published). In addition to the matters heretofore urged as making the unpublished scaling rules of the Northern Pacific ineffective, we also urge (Br. 22) that there is no evidence or sufficient offer of evidence to show such administrative construction, since joint tariff 51 was the first effective tariff using the term board measure, and it was filed October 1, 1925. There is no showing in the record that the Department ever acquiesced in the propriety of the practice of not filing scaling rules so far as *all* the carriers were concerned. (See Br. 8 and 88.) In any event even if there were such an administrative construction, it would be ineffective in face of the Washington statutes requiring the carrier to file with the commission schedules, including "any rules and regulations which may, in any wise, change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the * * * shipper * * *" To permit administrative construction to override the plain language of the statute would be to permit a subordinate body to override legislation.

Answer to Point No. 2

Appellant contends that the findings and order are inadmissible in whole or in part. We contend, however (Br. 22):

A. That the Supreme Court of Washington in the case of *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160 Wash. 691, conclusively determined that the order was supported by the findings, and that determination is not open to the collateral attack that the order is not supported by the findings (Br. 15). See *Willapa Power Co. v. Public Service Commission,* 110 Wash. 193, 195; *S. D.*

Warren Co. v. Maine Central R. Co., 135 Atl. (Me.) 526; *Public Service Commission v. City of Indianapolis,* 137 N. E. (Ind.) 705; *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29.

B. Items to which objection are made are not improper. Assignments of error 5 to 21, inclusive, are based upon the contention that the matters referred to were merely contentions, and therefor not findings admissible in evidence. But the findings and order must be construed as a whole, and when it is remembered that the Department accepted the shipper's contentions and in findings numbered 23 to 25 expressly found the facts as alleged, it is clear that the so-called contentions are more than mere contentions, and *by virtue of paragraphs 23 to 25 become findings,* and therefore admissible. Furthermore, as appears from the case of *Great Northern Railway Co. v. Department of Public Works,* 161 Wash. 29, 32, it is not objectionable that the contentions of the parties or the arguments used by them may be stated in the findings, and as long as they are separable it becomes a simple matter to instruct the jury as to what shall be considered *prima facie* evidence. Furthermore, if included in the findings are statements of the law, if the law thus stated is the correct and applicable law, no prejudicial error can result. See *Gallagher v. Town of Buckley,* 31 Wash. 380.

C. In any event, it is proper to permit the whole findings and order in evidence and to state the effect thereof to the jury in the court instructions. Even appellant's own cases make that plain. (See Br. 73-75). In this case, the court instructed the jury, both at the time that the findings and order were admitted (Tr. 104) and in his charge to the jury (Tr. 316-318), stating:

> "You will note that it is 'the facts therein stated' not the liability of the defendant, of which the findings and order are to constitute prima facie evidence; and 'the facts therein stated' do not include mere recitations of contentions put forth by the parties, nor

> statements, comments or opinions of the Department of Public Works as to the law applicable to the issues in this case, or as to any other matter not of a factual nature. You are not to consider anything contended in those findings and order except the facts therein stated.
>
> "It is my duty to instruct you as to the law applicable in this case, and it is your duty to accept the law as stated in these instructions."

The trial court properly exercised its discretion in instructing in its own language what the law as to these finding and order was. It was not bound to instruct in the language proposed by appellant. *Stanhope v. Strang,* 140 Wash. 693.

Answer to Point No. 3

Appellant contends that evidence as to other carriers' scaling ractices was inadmissible; but we contend (Br. 23) it was proper to rebut Mr. Long's testimony offered by the carrier. Mr. Long had testified that the Long-Woodworth agreement was drawn on the theory that everything would exist as it had been in the past on the part of the shippers in the way of scaling, and that the theory was that the scaling method was settled and uniformly applicable to all the railroads. (App. Br. 145). Appellee merely sought to explain what Mr. Long meant by his testimony as to the practice of the shippers in the past in the way of scaling, and as to the scaling method that was settled and uniformly applicable to all the railroads. Furthermore, the testimony was admissible to rebut appellant's evidence of uniform practical construction, and the claimed unambiguous meaning of board measure, which had been insisted upon by the appellant. The trial court, in permitting this rebuttal testimony, did not abuse its discretion. See *Kelley v. Department of Labor & Industries,* 172 Wash. 525, 529.

The testimony of the Milwaukee practice from 1913 to 1919 and 1920 to 1922 was not remote especially when the Northern Pacific testimony as to scaling practices went back

to 1906. There would naturally be the presumption of the Milwaukee scaling practices continuing. Furthermore, as to the Great Northern, the testimony of the scaling was for some period prior to the Long-Woodworth agreement and tariff 51, and until that was superseded. Clearly, the Great Northern practice would show the construction that the carriers themselves placed upon tariff 51 and also upon the Long-Woodworth agreement. Furthermore, the form of the competing carrier's tariffs would be immaterial since Mr. Long did not testify that the *warranted* scaling practices were to continue, but only that the shipper's scaling practices were to continue. (Br. 146, 147). Appellant was accorded full opportunity to rebut and to explain away the fact as to the scaling practices of other carriers, but though informed that it would have that opportunity on three different occasions, it did not attempt to do so. (Br. 147-148).

Answer to Point No. 4

Appellant complains of a number of instructions which are classified under certain headings (Br. 23). We have already pointed out that the court's instructions on the effect of findings and order were proper. Appellant contends, however, that the court permitted the jury to weigh as evidence the findings of the Department, despite contradicting testimony, and that this was improper. In other words, appellant seeks to treat the findings and order as though they constitute a presumption of law based on common experience and inherent probability. But even such presumptions may, according to many descisions, including the latest one in Washington, be treated as the fact, unless the testimony used to overcome it be believed as credible by the jury. That is the most that it can be claimed the court's instructions permitted the jury to do (Br. 163). *Karp v. Herder,* 81 Wash. Dec. 511; *Mutual Life Insurance Co. v. Maddox,* 128 So (Ala.) 383; *New York Life Insurance Co. v. Beason,* 155 So. (Ala.) 530; *Eiseman v. Austen,*

169 Atl. (Me.) 162; *Maxey v. Railey & Bros. Banking Co.*, 57 S. W. (2d) (Mo.) 1091.

In any event, we are not here dealing with a presumption of law, we are dealing with statute which makes findings and order *prima facie evidence,* and which permits such findings and order to be reviewed judicially. Under such circumstances, the legislative intention may well be deemed to be different from that of a common law presumption, and may well be deemed to intend that such findings and order shall be weighed as evidence even against contradicting evidence. It is purely a question of legislative intent. See *O'Dea v. Amodeo,* 170 Alt. (Conn.) 486.

It is entirely reasonable to believe that the legislature intended to give greater effect to findings and order subject to judicial review than it would give to an ordinary presumption of law.

In this connection, we call attention to the fact that no case cited by appellant decides whether the statute providing that findings and order shall constitute *prima facie* evidence of the facts stated is a presumption of law or a presumption of fact. If a presumption of fact, obviously the presumption, i. e. inference, may be weighed as evidence.

Furthermore, the instruction given by the trial court, even if the law were to the effect that the findings and order cannot be weighed, called attention to the right of the jury to weigh the findings as evidence as against contradictory evidence only by inference, and the error, if that be error, was not prejudical.

See *McMullen v. Warren Motor Co.,* 174 Wash. 454, decided before *Karp v. Herder,* 81 Wash. Dec. 511.

B. Appellant complains of certain matters connected with the Supreme Court decision. The action of the Supreme Court in reinstating the findings and order was pleaded in the supplemental complaint, and admitted in the answer and supplemental answer. (Br. 154). It was

therefore in evidence, since it is unnecessary to prove matters admitted in the pleadings. 62 C. J. 112; *Schwede v. Hemrich,* 29 Wash. 124; *Johnson v. Anderson,* 61 Wash. 100.

Being in evidence, it was a proper subject of comment, subject to the instruction of the court that the findings and order were not *prima facie* evidence of the liability of the defendant, which instruction the court gave. (Tr. 317).

C. The trial court refused a number of appellant's requested instructions, setting out rules for the interpretation of tariff 51 other than the rule that ambiguities must be construed in its commercial sense. We have already pointed out that the rule in Washington to which the court gave effect in its instruction to the jury was that ambiguities must be interpreted in their commercially understood sense. That was the only proper rule for the court to instruct the jury upon, since as appellant itself contends, the construction of the tariff was a question of law for the court.

D. Miscellaneous instructions given by the court are the subject of complaint by appellant. It is contended that certain instructions were contradictory in that the court instructed that it was for the jury to determine what was the proper method of scaling logs, and also instructed that ambiguities must be interpreted in their commercial sense. But there is no contradiction between telling the jury that ambiguities must be interpreted in their commercial sense, and also telling the jury that it is for the jury to determine what the commercial sense was. (Br. 176). Appellant complains of an instruction to the effect that if the jury found the method accepted commercially resulted in the carriage of some logs without compensation, that fact would make no difference. But as already pointed out, it must be conclusively presumed in this case that free carriage in form is not really free in fact, and that it is im-

material in this case that the application of the commercial method would seem to involve free carriage.

Appellant complains of the refusal of the court to give certain instructions dealing with protest and rules of tolerance. But there was no evidence to warrant the proposed instructions, and those given by the court were even more favorable to appellant than it was entitled to receive. (Br. 24).

Space limitations prohibit elaboration here of these matters dealing with instructions, but reference is made to our brief, p. 24, which indexes the more detailed discussion.

Answer to Point No. 5

Appellant contends that the striking of all pleading and evidence as to estoppel and counter-claim was improper. We contend (Br. 24) that the court properly struck the counter-claim whereby appellant sought judgment against appellee for refunds made under the Long-Woodworth agreement. There was no evidence proving any breach on the part of appellee of the Long-Woodworth agreement so as to be the basis of rescission, damages, or the imposition of equitable conditions. There is no evidence whatsoever that the Sauk River Lumber Company ever agreed to abide by the Northern Pacific scaling rules in the Long-Woodworth agreement or any place else. On the contrary, the evidence is that the shipper, as well as other shippers and other carriers, assumed that the commercial scaling practice would govern. There is, therefore, no basis in fact for any claimed breach of that agreement. Furthermore, there could be no rescission by one party after full performance of the obligations of the parties under the contract (especially under a joint contract). The appellee, as well as other carriers and the Department, abandoned any further fight against the carriers on the question of rates. The Department dismissed its proposed penalty suit which it had directed to be instigated against the carriers

for charging freight under suspended tariff 29. The carriers made refunds of freight charges unlawfully exacted under suspended tariff 29 from June 1, 1925, to October 1, 1925. Hence there was full performance of the obligations of all parties on all sides. Under such circumstances there could be no rescission. See *Cowley v. Northern Pacific Ry. Co.,* 68 Wash. 558; *Southern Pacific Ry. Co. v. Frye & Bruhn,* 82 Wash. 9.

Furthermore, there being no ground for equitable jurisdiction, there can be no relief by way of the imposition of equitable conditions. *Blue Point Oyster Co. v. Haagenson,* 209 Fed. 278.

B. Nor can the Long-Woodworth agreement furnish the basis of an estoppel. In the first place, the removal of the Long-Woodworth agreement as an estoppel defense at the time of the court's instructions to the jury was not excepted to, and of course no exception allowed. It would, therefore, seem that since no complaint can be made of the failure to submit the issue to the jury, no error can be claimed for the trial court's refusal to submit an instruction on a matter not in issue. In any event, as has heretofore been pointed out, the Long-Woodworth agreement could not be the basis of an estoppel in fact, (since the Northern Pacific scale was not agreed to) or in law, (since the provisions of a contract must yield to a tariff thereafter filed, if said stariff is different from the pre-existing contract).

Answer to Point No. 6

Appellant contends the court erred in not giving effect to the principle that free carriage is illegal. We have heretofore pointed out that it is conclusively presumed in this proceeding that there is no free carriage in fact and that therefore in this proceeding, as distinguished from a rate hearing, the question is irrelevant. (Br. 25). *Northern Pacific Railway Co. v. Sauk River Lumber Co.,* 160

Wash. 691; *State ex rel v. Department of Public Works,* 149 Wash. 129, 134; *Robinson v. Wolverton Auto Bus Co.,* 163 Wash. 160, 163; *Tonopah Sewer & Drainage Co. v. Nye County,* 254 Pac. (Nev.) 696; *Mellon v. Johnson Co.,* 219 N. W. (Wis.) 352, 353.

Answer to Point No. 7

Appellant contends that the plantiff's witness should not have been permitted to give his conclusion as to evidence before the Department of Public Works, but that testimony did not constitute an inadmissible conclusion. (Br. 25). *State v. Maxwell,* 1 N. W. (Iowa) 666.

Furtheremore, appellant was not prejudiced, since it brought out other testimony seeking to contradict that given by appellee's witness. (Br. 152, 153).

Answer to Point No. 8

Appellant contends that the Department's order is not final so that the plaintiff's case should be dismissed. (Br. 26). We contend that the motion to dismiss for lack of jurisdiction does not raise this question—that the proper way to raise the question is by demurrer for insufficient facts. Furthermore, the order reasonably considered clearly and finally fixes the amount of the overcharge and directs its payment. Findings 9 and 10, coupled with findings 23 to 25, clearly show that the shipper paid freight charges amounting to $188,784.55 during 1926; that it should have paid $179,501.92, resulting in the difference, both alleged and found, of $9,282.63. The order refers to the findings of fact and makes them a part of the order, and directs payment as reparation of all sums in excess of $179,501.92, together with interest. Except, then, but for the second paragraph of the order, there could be no question that the order was so far final as to permit a plenary suit to recover the amount thereof. The second paragraph of the order

referred to purports to retain jurisdiction for the purpose of entering a further order fixing the amount of reparation. But that paragraph, if it is anything more than surplusage, simply means that if the amount of reparation is in any sum other than that theretofore found, that the parties get together or else permit the Department to determine the amount other than that already found.

At most, this paragraph creates ambiguity, which ambiguity can best be resolved by looking to the way the parties themselves and the Supreme Court of Washington treated the order. The Supreme Court of Washington stated the effect of the findings and order in the following language, (Br. 12):

> "During the year 1926 the logging company shipped logs for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the Department of Public Works for a refund. Upon the hearing, the Department found that all payments in exces of $179,501.92 were excessive, making the overcharge $9,282.63."

The court further said:

> "As to the amount of recovery, this is based upon the calculations of a rate and traffic expert, and it appears to us to be substantially accurate."

The court's interpretation of the Departmental findings and order would seem to be not only highly persuasive but conclusive. See *Arizona Wholesale Grocery Co. v. Southern Pac. Co.,* 68 Fed. (2d) 601, C. C. A. 9th.

Furthermore, the appellant, in its petition for removal, treated the Departmental action as an order made by the Department that "petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharge." Judge Neterer himself, in his memorandum decision denying appellee's motion to re-

mand, pointed out that the jurisdiction of the Department of Public Works had been exhausted apparently on the theory that a final order had been entered. Judge Bowen likewise concurred in denying appellant's motion to dismiss. After nearly seven years of litigation, when everyone connected with the case had treated the Departmental order as final, the carrier suddenly and shortly before trial argues that it is not final and that the case should be returned to the Department of Public Works for the purpost of entering a final order. But what could the Department do that it has not already done? It could enter an order that the carrier repay overcharges in the sum of $9,282.63, a sum which it has already ordered to be repaid. It would be useless, therefore, to sacrifice form to substance and contend that despite its determination of the amount of the overcharge and despite its direction to the carrier that it repay the amount of its overcharge, that the order is not final for purposes of a plenary suit. See *State ex rel G. N. Ry. Co. v. Public Service Commission,* 76 Wash. 625.

Answer to Point No. 9

Appellant contends that the Departmental order is void because under the 1921 act the Department is entitled to a 10% fee. We contend (Br. 26):

A. That the 1921 act is not applicable to this proceeding, so as to involve the application of the 10% charge, because that charge is payable, if at all, only if refunds are collected by the Department, not merely if the award is made. (R. R. S. 10435, 10436). Where the award is sued on under the procedure provided by the 1911 act as is permitted by the 1921 act, the 10% statute is not applicable. (Laws of '21, p, 337, § 6). Furthermore, the statute is inapplicable because no judgment has been entered, that being a discretionary matter. (R. R. S. 10435). *Tacoma Grain Co. v. V. P. Ry. Co.,* 123 Wash. 664

Indeed, it is doubtful if the Director could constitutionally enter judgment on its reparation award See *Tacoma Grain Co. v. V. P. Ry. Co., supra,* p. 668.

In this connection, appellant's counsel has advised us that in his summarizing brief he refers to a cause in equity instituted by the state ex rel the Department (since this appeal was argued) against the carrier and shipper, requesting the District Court to direct payment of the judgment in this cause to the plaintiff for disbursement to the shipper, the state retaining 10% of the judgment for overcharge. That the Department, through the state, has no right to the judgment or 10% appears evident from the fact that the District Court on September 28th dismissed the bill of complaint, stating he did so on each ground assigned by the shipper. One of the grounds urged was that heretofore argued, namely, that the 10% is not payable if the shipper rather than the Department obtains the judgment and collects the overcharge. The carrier, therefore, has not been prejudiced by the absence of the Department as a party plaintiff.

B. In any event, the Department's pecuniary interest, even if the 10% statute is applicable, is indirect and remote, and therefore permissible. *Dugan v. State of Ohio,* 277 U. S. 61, 48 Sup. Ct. 439; *Bevan v. Krieger,* 289 U. S. 459, 53 S. Ct. 661.

C. Furthermore, the Departmental pecuniary interest does not invalidate the order because a judicial review and a subsequent *de novo* trial is permitted. *Bevan v. Krieger,* 289 U. S. 459; *Hill v. State,* 298 S. W. (Ark.) 321; *Brooks v. Town of Potomac,* 141 S. E. (Va.) 249.

Furthermore, the *Northern Pacific Railway Co. v. Sauk River Lumber Co.* case in which this point was urged by appellant, was apparently rejected as not a controlling point.

Answer to Point No. 10

Appellant contends that the shipper cannot recover because the Department is a necessary party, and until it appears to permit the shipper to recover would be to split a cause of action. We contend (Br. 26):

A. That since this point was made for the first time at the time of trial, was not made by demurrer or set up in its answer or supplemental answer, the point was waived. (R. R. S. § 263); *Dryden v. Sewell,* 2 Alaska 182; *Flanagan v. Drainage Dist. No.* 17, 2 S. W. (2d) (Ark.) 70; *Bignold v. Carr,* 24 Wash. 413; *Baxter v. Scoland* 2 Wash. Ter. 86.

B. In any event, the shipper may sue as the real party in interest, so the Department is not a necessary party. (R. R. S. § 179); *American Surety Company of New York v. Scott,* 63 Fed. (2d) 961, (C. C. A. 10th); *U. S. v. Skinner & Eddy Corp.,* 5 F. (2d) 708, 28 Fed. (2d) 373, 35 Fed. (2d) 889; 13 A. L. R. 288.

In other words, even though paper title to the award may be in the Department, the real party in interest may sue to recover it. See *Stotts v. Puget Sound Traction, Light & Power Co.,* 94 Wash. 339.

The order merely *recognizes* (a condition precedent) but *does not create* the pre-existing shipper's right to reparation.

If the appellant deemed the presence of the Department necessary to a determination of this litigation, it would have brought the Department in as an additional party in this case under the provision of R. R. S. § 196. Simpkin's Federal Practice (Rev. Ed.) § 25, p. 27.

Appellant's only complaint as to the absence of the Department is that it might be the subject of successful suit by the Department for the same award. But obviously, if the shipper recovers as real party in interest, the De-

partment cannot successfully sue to recover the same claim. A recovery by the real party in interest is a bar.

47 C. J. 34; *Blaser v. Fleck,* 189 Pac. (Ore.) 637, 638.

There were sufficient parties before the court to permit appellant to interpose all its defenses, and no injustice was done to the appellant by reason of the absence of the Department. Hence no legal prejudice can result. See *Davison v. Rake,* 16 Atl. (N. J.) 227, affirmed 18 Atl (N. J.) 752.

Furthermore, the Department isn't entitled to the 10%. See answer to Point 9-A.

C. It follows that there is no splitting of a cause of action involved. The real party in interest recovers the whole amount. If it owes the money to the Department, that is not a matter with which the carrier has any concern since a recovery by the real party in interest bars recovery by anyone else, and the carrier's concern is at an end. See *Harris v. Johnson,* 75 Wash. 291.

The foregoing summary of appellee's answering contentions does not exhaust the subject matter of the brief, but is intended merely to present a bird's eye picture of those contentions, which contentions are more fully developed in the brief itself under the various assignments of error. It will be noted, too, that the summary follows the order of the summary printed on pp. 18 to 27 of appellee's brief. Whenever, therefore, it becomes desirable to study any particular contention in detail, it will be possible by turning to that summary and to the pages indicated therein to get a detailed discussion of the various contentions.

It is respectfully submitted that in view of the fact that tariff 51 is a joint tariff applicable to all carriers and shippers alike, and in view of the fact that the Northern Pacific is urging an interpretation of board measure followed by no one except itself, and directly contrary to the

interpretation followed by other carrier parties to the same tariff, that in substance the Northern Pacific is asking for a discrimination against its shippers and a special privilege for itself, to which it is not entitled. It is respectfully submitted that the judgment of the trial court as against appellant's appeal should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY, a corporation,
Appellee and Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPENDIX

Washington Statutes in Briefs of Appellant and Cross-Appellee

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INDEX

Remington's Revised Statutes
Remington's Compiled Statutes

Section	*Page*
457	1
5841	2
7299	2
10345	2
10350	3
10351	5
10354	6
10357	9
10389	10
10423	11
10428	12
10430	13
10433	14
10434	15
10435	15
10436	16
10437	16
10438	17
10439	17
10442	17
10443	19
10450	19

Ch. 110, Laws of 1921, §§ 1 to 6 are Remington's Revised Statutes, §§ 10434 to 10439, inc.

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As requested we submit herewith a copy of all sections of the Washington statutes referred to in the several briefs with section numbers as carried in Remington's Revised Statutes referred to in the brief, and also carried under the same section numbers in Remington's Compiled Statutes.

§ 457. *Interest on judgments.* Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate,

shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent per annum: Provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof. (L. '99, p. 129, § 6, Cf., 2 H. C., § 459; L. '95, p. 350, § 4.)

§ 5841. *Charges in excess of published rates to be refunded.* Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid. (L. '07, p. 407, § 1.)

§ 7299. *Interest rate—Loan defined.* Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor or indorser, shall be considered as a loan for the purposes of this chapter. (L. '99, p. 128, § 1. Cf. L. '95, p. 349, § 1.)

§ 10345. *Charges—Duties of common carriers.* All charges made for any service rendered or to be ren-

dered in the transportation of persons or property, or in connection therewith, by any common carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient.

Every common carrier shall construct, furnish, maintain and provide safe, adequate and sufficient service facilities, trackage, sidings, railroad connections, industrial and commercial spurs and equipment to enable it to promptly, expeditiously, safely and properly receive, transport and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort and convenience of its patrons, employees and the public.

All rules and regulations issued by any common carrier affecting or pertaining to the transportation of persons or property shall be just and reasonable. (L. '11, p. 546, § 9.)

§ 10350. *Tariff schedules—Publication.* Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such

through route shall file, print and keep open to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain cassification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules and regulations which may in any wise change, affect, or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor cars or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from

such schedules any transportation rates or fares, or rules and regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto.

The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes. (L. '11, p. 548, § 14.)

§ 10351. *Changes in schedule — Notice required.* Unless the commission otherwise orders no change shall be made in any classification, rate, fare, charge, rule or regulation which shall have been filed and published by a common carrier in compliance with the preceding section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time

when the changed rate, classification, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may by order allow changes in rates without requiring the thirty days' notice and the publication herein provided for. When any change is made in any rate, fare, charge, classification, rule or regulation, the effect of which is to increase any rate, fare or charge then existing, attention shall be directed to such increase by some character on the copy filed with the commission immediately preceding or following the item in such schedule, such character to be designated by the commission. (L. '11, p. 550, § 15.)

§ 10354. *Published Rates to be Charged—Free or Reduced Transportation.*

No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified excepting upon order of the commission as hereinafter provided, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

No common carrier shall, directly or indirectly, issue or give any free ticket, free pass or free or reduced transportation for passengers between points within this state, except its employees and their families, its officers, agents, surgeons, physicians and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk and fruit; to employees of sleeping-car companies, express companies, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains; baggage agents, witnesses attending any legal investigation in which the common carrier is interested; to persons injured in accidents or wrecks and physicians and nurses attending such persons; to the National Guard of Washington when on official duty, and students going to and returning from state institutions of learning: Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, attorneys, agents and employees and their families, of railroad companies, steamboat companies,

express companies and sleeping-car companies with other railroad companies, steamboat companies, express companies and sleeping-car companies, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: and provided, further, that this provision shall not be construed to prohibit the exchange of passes or franks for the officers, attorneys, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, attorneys, agents, employees, and their families of other telegraph, telephone or cable lines, or with railroad companies, express companies or sleeping-car companies: Provided, further, that the term "employee" as used in this section shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed or dying in the employment of a carrier, those entering or leaving its service and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this section shall include the families of those persons named in this proviso, also the families of persons killed and the widows during widowhood and minor children during minority of persons who died while in the service of any such common carrier: And provided, further, that nothing herein contained shall prevent the issuance of mileage, commutation tickets or excursion passenger tickets: And provided, further, that nothing in this section shall be construed to prevent the issuance

of free or reduced transportation by any street rail road company for mail carriers or policemen or members of fire departments, city officers, and employees when engaged in the performance of their duties as such city employees.

Common carriers subject to the provisions of this act may carry, store or handle, free or at reduced rates, property for the United States, state, county or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, and may carry, store or handle, free or at reduced rates, the household goods and personal effects of its employees and those entering or leaving its service and those killed or dying while in its service.

Nothing in this act shall be construed to prohibit the making of a special contract providing for the mutual exchange of service between any railroad company and any telegraph or telephone company, where the line of such telegraph or telephone company is situated upon or along the railroad right of way and used by both such companies. (L. '11, p. 551, § 18.) (Subsequently amended by ch. 96, L. '29, p. 185.)

§ 10357. *Unreasonable preference.* No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (L. '11, p. 555, § 21.)

§ 10389. *Charges and services to be fixed by commission.* Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided. (L. '11, p. 571, § 53.)

§ 10423. *Hearings, orders and record.* At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The Commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission. (L. '11, p. 593, § 81.)

§ 10428. *Review.* Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action. (L. '11, p. 596, § 86.)

§ 10430. *Appeal to the Supreme Court.* The commission, any public service company or any complainant may, within twenty days after the entry of judgment in the superior court in any action of review, prosecute an appeal to the supreme court of the state of Washington. The appellant shall have fifty days after the entry of such judgment in which to serve and file his opening brief, and the respondent shall have thirty days after the service of such opening brief in which to answer the same. The appellant shall have twenty days after the service of respondent's brief in which to reply to the same. After the filing of such brief, or the expiration of the time for filing briefs, the cause shall be assigned for hearing at the earliest motion day of the court, or at such other time as the court shall fix, and the clerk of the court shall notify the attorneys for the respective parties of the date set for the hearing in time to permit the parties to participate in the hearing. Such appeal shall be taken by giving a notice of the appeal in open court at the time of the rendition of judgment, or by the service and filing of a notice of appeal within twenty days from and after the entry of the judgment.

The original transcript of the record and testimony filed in the superior court in any action to review an order of the commission, together with a transcript of the proceedings in the superior court, shall constitute the record on appeal to the supreme court.

No appeal shall be effective, when taken by a public service company or a complainant, unless a cost bond on appeal in the sum of two hundred dollars

($200) shall be filed within five days after the service of the notice of appeal.

The superior court may, in its discretion, suspend its judgment pending the hearing in the supreme court, upon the filing of a bond, with a good and sufficient surety, conditioned as provided for bonds upon actions for review, or upon such other or further terms and conditions as it may deem proper. The general laws relating to appeals to the supreme court shall, so far as applicable and not in conflict with the provisions of this act, apply to appeals taken under the provisions of this act. (L. '11, p. 598, § 88.)

§ 10433. *Overcharge.* When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonabe attorney's

fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission. (L. '11, p. 600, § 91.) (Subsequently amended by Ch. 148, L. '33, p. 521.)

§ 10434. *Refunds and overcharges—Determination by director of public works.* The director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in all cases where any public service company, as defined in this chapter, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid: Provided, that this act shall not apply to controversies arising in relation to contracts in existence prior to the taking effect of this chapter. (L. '21, p. 336, § 1.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10435. *Judgment for overcharge—Collection.* Upon determining the amount of overcharge due from any such public service company, the director of public works may, if he deem it necessary to insure the prompt payment of the same to him, render judgment against such public service company for the amount of such overcharge. From and after the time that a

transcript of said judgment is filed with and recorded and indexed by the county auditor as instruments relating to real and personal property are filed, recorded and indexed, it shall be a lien against all real and personal property of such public service company located in the county in which such transcript is filed, recorded and indexed. Such judgment may be enforced by execution and sale through the sheriff of any county in which is found any real or personal property belonging to such public service company, said execution to be delivered to the sheriff by the director of public works and the execution to be levied and the sale made by the sheriff in the same manner as levies and sales are made on judgments of the superior court. (L. '21, p. 336, § 2.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10436. *Payment of refunds collected.* All refunds collected by the director of public works under this act shall immediately be paid to the person, firm or corporation entitled thereto less a fee of ten per cent on the amount collected, which shall be charged by the director of public works, deducted by him and paid into the public service revolving fund of the state treasury. (L. '21, p. 337, § 3.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10437. *Unclaimed refunds.* All refunds collected by the director of public works and which at the expiration of two years are unclaimed, or which he is unable to deliver to the person entitled thereto, shall be paid by the director of public works into the public service revolving fund of the state treasury. (L. '21,

p. 337, § 4.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10438. *Rules and regulations.* The director of public works shall have power to make rules and regulations for carrying out the provisions of this act. (L. '21, p. 337, § 5.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10439. *Hearings and procedure.* Hearings to determine the amount of any refund due under this act shall be held in the same manner, the same procedure followed, and judgments and orders subject to review and appeal in the courts as is provided for hearings, procedure, reviews, and appeals in matters before the public service commission of Washington under the provisions of this chapter. (L. '21, p. 337, § 6.) (Subsequently repealed by § 2, ch. 148, L. '33, p. 522.)

§ 10442. *Summary proceedings.* Whenever the commission shall be of opinion that any public service company is failing or omitting, or about to fail or omit, to do anything required of it by law, or by order, direction or requirement of the commission, or is doing anything, or about to do anything, or permitting anything, or about to permit anything to be done contrary to or in violation of law or of any order, direction or requirement of the commission authorized by this act, it shall direct the attorney general to commence an action or proceeding in the superior court of the state of Washington for Thurston county or in the superior court of any county in which such company may do business, in the name of the state of Washing-

ton on the relation of the commission, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. The attorney general shall thereupon begin such action or proceeding by petition to such superior court, alleging the violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding twenty days after the service of the copy of the petition, within which the public service company complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct, without other or formal pleadings, and without respect to any technical requirement. Such persons or corporations as the court may deem necessary or proper to be joined as parties in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction, or both, issue as prayed for in the petition, or in such other modified form as the court may determine will afford appropriate relief. An appeal may be taken to the supreme court from such final judgment in the same manner and with the same effect as appeals from judgments of the superior court in actions to review orders of the commission. All provisions of this act relating to the time of appeal, the manner of perfecting the same, the filing of briefs, hearings and supersedeas, shall apply to appeals to the supreme court

under the provisions of this section. (L. '11, p. 605, § 93.)

§ 10443. *Penalties for violation of act or orders.* Every public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this act, so long as the same shall be and remain in force. Any public service company which shall violate or fail to comply with any provisions of this act, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this act shall be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof shall be and be deemed to be a separate and distinct offense. (L. '11, p. 606, § 94.)

§ 10450. *Commission shall enforce laws.* It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal. (L. '11, p. 608, § 101.)

No. 7887

In the United States Circuit Court of Appeals For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

ADDENDA TO BRIEF OF APPELLEE AND CROSS-APPELLANT

WASHINGTON STATUTES CITED

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INDEX

Rem. Rev. Stat. § 179 1
§ 196 1
§ 259 1
§ 263 2
§ 297 2
§ 5509 3
§ 5510 3
§ 10350 3
§ 10354 5
§ 10356 8
§ 10422 9
§ 10433 11
§ 10435 11
§ 10436 12
§ 10448 12
§ 10450 13
§ 10776 13
§ 10779 14
§ 10784 14
§ 10896 15
§ 10939-3 15

L's 1911, Ch. 117, §86 15

L's 1911, Ch. 117, §89 16
p. 548, §14 17
p. 600, §91 19

L's 1921, p. 18, Ch. 7, §21 20

L's 1921, Ch. 110, §1, p. 336 20
Ch. 110, §2 & 3, pp. 336-7 21
Ch. 110, §6, p. 337 22

L's 1923, Ch. 62, §3, p. 192 22

In the

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellant and Cross-Appellee. vs. **THE SAUK RIVER LUMBER COMPANY**, a corporation, Appellee and Cross-Appellant.	**Statutes Cited in Brief of Appellee and Cross-Appellant** No. 7887

R. R. S. Sec. 179 provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

R. R. S. Sec. 196 provides:

> "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in."

R. R. S. Sec. 259 provides:

> "The defendant may demur to the complaint when it shall appear upon the face thereof either—
>
> 1. That the court has no jurisdiction of the

person of the defendant or of the subject matter of the action;

2. That the plaintiff has no legal capacity to sue; or

3. That there is another action pending between the same parties for the same cause; or

4. That there is a defect of parties, plaintiff or defendant; or

5. That several causes of action have been improperly united;

6. That the complaint does not state facts sufficient to constitute a cause of action;

7. That the action has not been commenced within the time limited by law."

R. R. S. Sec. 263 provides:

"If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

R. R. S. Sec. 297 provides:

"Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party, as

upon a direct denial or avoidance, as the case may require."

R. R. S. Sec. 5509 provides:

"All moneys now in or that may be paid into the state treasury from any and all sources, except moneys received from taxes levied for specific purposes and excepting the several permanent and irreducible funds of the state, and the moneys derived therefrom, shall be paid into and become a part of the general fund of the state."

R. R. S. Sec. 5510 provides:

"All salaries and other expenses heretofore required to be paid from any of the funds affected by the last section shall hereafter be paid from the state general fund."

R. R. S. Sec. 10350 provides:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open

to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules and regulations which may in any wise change, affect, or determine any part, or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor cars or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares, or rules and regulations which are in force shall be kept posted by the

carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of congress entitled "An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto.

"The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

"The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes."

R. R. S. Sec. 10354.

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified excepting upon order of the commission as hereinafter provided, nor extend

to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances. No common carrier shall, directly or indirectly, issue or give any free ticket, free pass or free or reduced transportation for passengers between points within this state, except its employees and their families, surgeons and physicians and their families, its officers, agents and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, charitable and ellemosynary (eleemosynary) institutions and persons exclusively engaged in charitable and ellemosynary (eleemosynary) work; to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk and fruit; to employees of sleeping car companies, express companies, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains; baggage agents, witnesses attending any legal investigation in which the common carrier is interested; to persons injured in accidents or wrecks and physicians and nurses attending such persons; to the National Guard of Washington when on official duty, and students going to and returning from the state institutions of learning; Provided, That this provision shall not be con-

strued to prohibit the interchange of passes for the officers, attorneys, agents and employees and their families, of railroad companies, steamboat companies, express companies and sleeping car companies with other railroad companies, steamboat companies, express companies and sleeping car companies, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided, further, That this provision shall not be construed to prohibit the exchange of passes or franks for the officers, attorneys, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, attorneys, agents, employees, and their families of other telegraph, telephone or cable lines, or with railroad companies, express companies or sleeping car companies: Provided, further, That the term "employee" as used in this section shall include furloughed, pensioned, and superanuated employees, persons who have become disabled or infirm in the service of any such common carrier and the remains of a person killed or dying in the employment of a carrier, those entering or leaving its service and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this section shall include the families of those persons named in this proviso, also the families of persons killed and the widows during widowhood and minor children during minority, of persons who died while in the service of any such common carrier: And provided, further, That nothing herein contained shall prevent the issuance of mileage, commutation tickets or excursion passenger tickets: And, provided, further, That nothing in this section shall be construed

to prevent the issuance of free or reduced transportation by any street railroad company for mail carriers, or policemen or members of fire departments, city officers, and employees when engaged in the performance of their duties as such city employees.

"Common carriers subject to the provisions of this act may carry, store or handle, free or at reduced rates, property for the United States, state, county or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, and may carry, store or handle, free or at reduced rates, the household goods and personal effects of its employees and those entering or leaving its service and those killed or dying while in its service.

"Nothing in this act shall be construed to prohibit the making of a special contract providing for the mutual exchange of service between any railroad company and any telegraph or telephone company, where the line of such telegraph or telephone company is situated upon or along the railroad right of way and used by both of such companies."

R. R. S. Sec. 10356 provides:

"No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other dveice or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property except as authorized in this act, than it charges, demands, collects or receives from any person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or

substantially similar circumstances and conditions."

R. R. S. Sec. 10422 provides:

"Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: Provided, that no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: Provided, further, that when two or more public service corporations (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremumerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon

its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

"All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rules shall apply and pertain with regard to the joinder of complaints and parties as herein provided: Provided, all grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

"Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting

as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission."

R. R. S. Sec. 10433 provides:

"When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

R. R. S. Sec. 10435 provides:

"Upon determining the amount of overcharge due from any such public service company, the

director of public works may, if he deem it necessary to insure the prompt payment of the same to him, render judgment against such public service company for the amount of such overcharge. From and after the time that a transcript of said judgment is filed with and recorded and indexed by the county auditor as instruments relating to real and personal property are filed, recorded and indexed, it shall be a lien against all real and personal property of such public service company located in the county in which such transcript is filed, recorded and indexed. Such judgment may be enforced by execution and sale through the sheriff of any county in which is found any real or personal property belonging to such public service company, said execution to be delivered to the sheriff by the director of public works and the execution to be levied and the sale made by the sheriff in the same manner as levies and sales are made on judgments of the superior court."

R. R. S. Sec. 10436 provides:

"All refunds collected by the director of public works under this act shall immediately be paid to the person, firm or corporation entitled thereto less a fee of ten per cent on the amount collected, which shall be charged by the director of public works, deducted by him and paid into the public service revolving fund of the state treasury."

R. R. S. Sec. 10448, provides:

"In all actions between private parties and public service companies involving any rule or order of the commission, and in all actions for the recovery of penalties provided for in this act,

or for the enforcement of the orders or rules issued and promulgated by the commission, the said orders and rules shall be conclusive unless set aside or annulled in a review as in this act provided."

R. R. S. Sec. 10450 provides:

"It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal."

R. R. S. Sec. 10776 provides:

"The directors of the departments of the state government created by this act shall respectively exercise such powers and perform such executive and administrative duties as are provided by this act, and receive such annual salaries payable in equal monthly installments, as the governor shall fix, not to exceed the sums provided by this act: Provided, that should the governor appoint any elective state officer as the director of any department created by this act, such elective officer shall receive as compensation for the extra duties imposed by this act only such sum as the governor shall fix, not to exceed the difference between the maximum salary provided by this act and the salary provided by law for such elective officer. Each officer whose office is created by this act shall, before entering upon the duties of his office, take and subscribe the oath of office prescribed by law for elective state officers, and file the same in the office of the secretary of state."

R. R. S. Sec. 10779, provides:

"The department of public works shall be organized into and consist of three divisions, to be known respectively, as (1) the division of transportation, (2) the division of public utilities, and (3) the division of highways. The director of public works, shall have charge and general supervision of the department of public works, shall receive a salary of not to exceed six thousand dollars per annum, shall appoint a traffic and rate expert for the department, and shall have power to appoint and employ such clerical and other assistants as may be necessary for the general administration of the department."

R. R. S. Sec. 10784 provides:

"The director of public works shall have the power, and it shall be his duty, through and by means of the division of public utilities:

(1) To exercise all the powers and perform all the duties now vested in, and required to be performed by, the public service commission, except the powers and duties relating to common carriers of freight and passengers and the transportation of property and persons, those relating to the inspection, grading, and certification of grain, hay, peas, grain and hay products, rice, beans, and other similar articles, nitrates and other fertilizers and sulphur and other chemicals, those relating to the inspection of tracks, bridges, structures, machinery, equipment, and apparatus of railroad, street railways, gas plants, electrical plants, water systems, telephone lines, telegraph lines, and other public utilities with respect to the safety of employees, those relating to the administration and enforcement of laws providing for the protection of employees of railroads,

street railways, gas plants, electrical plants, water systems, telephone lines, telegraph lines, and other public utilities, and those relating to the enforcement, amendment, alteration, change, and making additions to rules and regulations concerning the operation, placing, erection, maintenance, and use of electrical apparatus, and the construction thereof;

(2) To exercise such other powers and perform such other duties as may be provided by law."

R. R. S. Sec. 10896 provides:

"Wherever the salary or compensation of any appointive state officer or employee is fixed by statute, it may be hereafter increased or decreased in the manner provided by law for the fixing of the salaries or compensation of other appointive state officers or employees: Provided, however, that the provisions of this act shall not apply to the salary of the directors of departments provided for in this chapter."

R. R. S. Sec. 10939-3 provides:

"The division of highways and the position of supervisor of highways are hereby abolished."

L's 1911, Ch. 117, Section 86 provides:

"Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable

not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action."

L's 1911, Ch. 117, Section 89 provides:

"Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such

as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint, and such orders may be reviewed as are other orders of the commission: Provided, That no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission."

L's 1911, Ch. 117, Section 14 provides:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been

established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in anywise change, affect, or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor car or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to de-

termine from such schedules any transportation rates or fares or rules or regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of congress entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto.

"The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

"The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes."

L's 1911, Ch. 117, sec 91 provides:

"When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

L's 1921, Ch. 7, Sec. 21 provides:

"The department of public works shall be organized into and consist of three divisions, to be known respectively as, (1) the division of transportation, (2) the division of public utilities, and (3) the division of highways. The director of public works, shall have charge and general supervision of the department of public works, shall receive a salary of not to exceed six thousand dollars per annum, shall appoint a traffic and rate expert for the department, and shall have power to appoint and employ such clerical and other assistants as may be necessary for general administration of the department."

L's 1921, Chap. 110, Sec. 1, provides:

"That the director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in

all cases where any public service company, as defined in chapter 117 of the Laws of 1911, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid: Provided, That this act shall not apply to controversies arising in relation to contracts in existence prior to the taking effect of said chapter 117 of the Laws of 1911.

Sec. 2. Upon determining the amount of overcharge due from any such public service company, the director of public works may, if he deem it necessary to insure the prompt payment of the same to him, render judgment against such public service company for the amount of such overcharge. From and after the time that a transcript of said judgment is filed with and recorded and indexed by the county auditor as instruments relating to real and personal property are filed, recorded and indexed, it shall be a lien against all real and personal property of such public service company located in the county in which such transcript is filed, recorded and indexed. Such judgment may be enforced by execution and sale through the sheriff of any county in which is found any real or personal property belonging to such public service company, said execution to be delivered to the sheriff by the director of public works and the execution to be levied and the sale made by the sheriff in the same manner as levies and sales are made on judgments of the superior court.

Sec. 3. All refunds collected by the director of public works under this act shall immediately be

paid to the person, firm or corporation entitled thereto less a fee of ten per cent on the amount collected, which shall be charged by the director of public works, deducted by him and paid into the public service revolving fund of the state treasury.

* * * * *

Sec. 6. Hearings to determine the amount of any refund due under this act shall be held in the same manner, the same procedure followed, and judgments and orders subject to review and appeal in the courts as is provided for hearings, procedure, reviews and appeals in matters before the public service commission of Washington under the provisions of chapter 117 of the Laws of 1911."

L's 1923, Chap. 62, Sec. 3, provides:

"The division of highways and the position of supervisor of highways are hereby abolished."

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Attorneys for Appellee and Cross-Appellant.

No. 7887

In the United States Circuit Court of Appeals For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

ADDENDA TO CROSS-APPELLANT'S BRIEF

WASHINGTON STATUTES CITED

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INDEX

Rem. Rev. Stat. 457 1

Rem. Rev. Stat. 5841, (Laws of '07, p. 407, §1) 1

Rem. Rev. Stat. 7299, (Laws of '99, p. 128, §1) 1

Rem. Rev. Stat. 10350, (Laws of '11, p. 548) 2

Rem. Rev. Stat. 10352 3

Rem. Rev. Stat. 10354 4

Rem. Rev. Stat. 10433 7

Rem. Rev. Stat. 10450 7

Rem. Rev. Stat. 10784 8

Rem. Rev. Stat., sec. 457 provides:

> "Judgments heerafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent per annum: Provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof."

Rem. Rev. Stat., sec. 5841, (Laws of '07, p. 407, sec. 1) provides:

> "Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by the law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid."

Rem. Rev. Stat., sec. 7299 provides:

> "Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per centum per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor or indorser, shall be considered as a loan for the purposes of this chapter."

Rem. Rev. Stat., sec. 10350 provides:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules and regulations which may in any wise change, affect, or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in

every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor cars or other train accommodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares, or rules and regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of congress entitled 'An act to regulate commerce,' approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto.

"The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

"The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes."

Rem. Rev. Stat., sec. 10352 provides:

"The names of the several carriers which are parties to any joint tariff shall be specified therein,

and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the carriers filing the same also to file copies of the tariffs in which they are named as parties.

"Every common carrier shall file with the commission copies of every contract, agreement or arrangement with any other common carriers relating in any way to the transportation of persons or property."

Rem. Rev. Stat., sec. 10354 provides:

"No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified excepting upon order of the commission as hereinafter provided, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances. No common carrier shall, directly or indirectly, issue or give any free ticket, free pass or free or reduced transportation for passengers between points within this state, except its employees and their families, surgeons and physicians and their families, its officers, agents and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals, charitable and ellemosynary (eleemosy-

nary) institutions and persons exclusively engaged in charitable and ellemosynary (elcemosynary) work; to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk and fruit; to employees of sleeping car companies, express companies, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors and immigration inspectors; to newsboys on trains; baggage agents, witnesses attending any legal investigation in which the common carrier is interested; to persons injured in accidents or wrecks and physicians and nurses attending such persons; to the National Guard of Washington when on official duty, and students going to and returning from the state institutions of learning: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, attorneys, agents and employees and their families, of railroad companies, steamboat companies, express companies and sleeping car companies with other railroad companies, steamboat companies, express companies and sleeping car companies, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided, further, That this provision shall not be construed to prohibit the exchange of passes or franks for the officers, attorneys, agents, emloyees, and their families of such telegraph, telephone and cable lines, and the officers, attorneys, agents, employees, and their families of other telegraph, telephone or cable lines, or with railroad

companies, express companies or sleeping car companies: Provided, further, That the term 'employee' as used in this section shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed or dying in the employment of a carrier, those entering or leaving its service and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this section shall include the families of those persons named in this proviso, also the families of persons killed and the widows during widowhood and minor children during minority, of persons who died while in the service of any such common carrier: And provided, further, That nothing herein contained shall prevent the issuance of mileage, commutation tickets or excursion passenger tickets: And provided, further, That nothing in this section shall be construed to prevent the issuance of free or reduced transportation by any street railroad company for mail carriers, or policemen or members of fire departments, city officers, and employees when engaged in the performance of their duties as such city employees.

"Common carriers subject to the provisions of this act may carry, store or handle, free or at reduced rates, property for the United States, state, county or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, and may carry, store or handle, free or at reduced rates, the household goods and personal effects of its employees and those entering or leaving its service and those killed or dying while in its service.

"Nothing in this act shall be construed to prohibit the making of a special contract providing for the mutual exchange of service between any railroad company and any telegraph or telephone company,

where the line of such telegraph or telephone company is situated upon or along the railroad right of way and used by both of such companies."

Rem. Rev. Stat., sec. 10433 provides:

"When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

"If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

Rem. Rev. Stat., sec. 10450 provides:

"It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal."

Rem. Rev. Stat., sec. 10784 provides:

"The director of public works shall have the power, and it shall be his duty, through and by means of the division of public utilities:

(1) To exercise all the powers and perform all the duties now vested in, and required to be performed by, the public service commission, except the powers and duties relating to common carriers of freight and passengers and the transportation of property and persons, those relating to the inspection, grading, and certification of grain, hay, peas, grain and hay products, rice, beans, and other similar articles, nitrates and other fertilizers and sulphur and other chemicals, those relating to the inspection of tracks, bridges, structures, machinery, equipment, and apparatus of railroad, street railways, gas plants, electrical plants, water systems, telephone lines, telegraph lines, and other public utilities with respect to the safety of employees, those relating to the administration and enforcement of laws providing for the protection of employees of railroads, street railways, gas plants, electrical plants, water systems, telephone lines, telegraph lines, and other public utilities, and those relating to the enforcement, amendment, alteration, change, and making additions to rules and regulations concerning the operation, placing, erection, maintenance, and use of electrical apparatus, and the construction thereof;

"(2) To exercise such other powers and perform such other duties as may be provided by law."

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Attorneys for Appellee and Cross-Appellant.

No. 7887

In the United States Circuit Court of Appeals For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee.

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

ADDENDA TO REPLY BRIEF OF CROSS-APPELLANT

WASHINGTON STATUTES CITED

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INDEX

Rem. Bal Code 5305 1

Rem. Code 5305 1

Rem. Comp. Stat. 5841 1

Rem. Rev. Stat. 5841 2

Rem. Rev. Stat. 10433 2

Rem. Rev. Stat. 10350 3

Laws of '11, § 109, p. 611 5

Laws of '11, §111, p. 611 5

Laws of '11, §112, p. 612 6

Rem. Bal. Code, sec. 5305 provides:

> "Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid."

Rem. Code, sec. 5305 provides:

> "Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid."

Rem. Comp. Stat., sec. 5841 provides:

> "Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such

claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid."

Rem. Rev. Stat., sec. 5841 provides:

"Any corporation, partnership or individual who furnishes the public any goods, wares, merchandise, pledge, security, insurance or transportation of which the price, rate or tariff is by law required to be published, shall, when any price, rate or tariff is charged in excess of the existing and established price, rate or tariff, refund to the person, partnership or corporation so overcharged, or to the assignee of such claim, the amount of such overcharge, and on failure so to do, the claim for such overcharge shall bear interest at the rate of eight per cent per annum until paid."

Rem. Rev. Stat., sec. 10433 provides:

"When complaint has been made to the commission concerning the reasonableness of any rate, fare, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission shall determine that the public service company has charged an excessive or exorbitant amount for such service, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, with interest from the date of collection.

If the public service company does not comply with the order for the payment of the overcharge within the time limited in such order, suit may be instituted in any court of competent jurisdiction to recover the same, and in such suit the findings and order of the commission shall be prima facie evi-

dence of the facts therein stated. If the complainant shall prevail in such action, he shall be allowed a reasonable attorney's fee, to be fixed and collected as part of the costs of the suit. All complaints concerning overcharges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission."

Rem. Rev. Stat., sec. 19350 provides:

"Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges and classification for the transportation of persons and property within the state between each point upon its route and all other points thereon; and between each point upon its route and all points upon every route leased, operated or controlled by it; and between each point on its route or upon any route leased, operated or controlled by it and all points upon the route of any other common carrier, whenever a through route and joint rate shall have been established or ordered between any two such points. If no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to the public inspection, as aforesaid, the separately established rates, fares, charges and classifications, applied to the through transportation. The schedules printed as aforesaid, shall plainly state the places between which property and persons will be carried, and shall also contain classification of passengers or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules and regulations which may

in any wise change, affect, or determine any part, or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type, and a copy thereof shall be kept by every such carrier readily accessible to and for inspection by the public in every station or office of such carrier where passengers or property are respectively received for transportation, when such station or office is in charge of any agent, and in every station or office of such carrier where passenger tickets for transportation or tickets covering sleeping or parlor cars or other train accomodation are sold or bills of lading or receipts for property are issued. All or any of such schedules kept as aforesaid shall be immediately produced by such carrier for inspection upon the demand of any person. A notice printed in bold type and stating that such schedules are on file with the agent and open to inspection by any person and that the agent will assist any such person to determine from such schedules any transportation rates or fares, or rules and regulations which are in force shall be kept posted by the carrier in two public and conspicuous places in every such station or office. The form of every such schedule shall be prescribed by the commission and shall conform in the case of railroad companies as nearly as may be to the form of schedules required by the interstate commerce commission under the act of congress entitled 'An act to regulate commerce,' approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto.

The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting

and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions.

The commission may, in its discretion, suspend the operation of this section in whole or in part as applied to vessels engaged in jobbing business not operating on regular routes."

L's 1911, p. 611, sec. 109.

"That chapter 81 of the Laws of 1905, chapter 226 of the Laws of 1907, chapter 142 of the Laws of 1907, and chapter 93 of the Laws of 1909, be and the same are hereby repealed."

L's 1911, p. 611, sec. 111.

"This act shall not affect pending actions or proceedings, civil or criminal, brought by or against the railroad commission of Washington, or by any other person or corporation, under the provision of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplemental thereto, but the same may be prosecuted or defended in the name of the railroad commission of Washington, or otherwise, with the same effect as though this act had not been passed. Any investigation, examination or proceeding undertaken, commenced or instituted by the railroad commission of Washington prior to the taking effect of this act may be conducted and continued to a final determination by the public service commission hereby created, in the same manner, under the same terms and conditions, and with like effect as though the railroad commission of Washington had not been abolished.

No cause of action arising under the provisions of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplementary thereto, or dependent thereon, shall abate by reason of the pass-

age of this act, whether a suit or action has been instituted thereon at the time of the taking effect of this act or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though said chapter (and the acts amendatory thereof or supplemental thereto) had not been repealed.

All findings, orders and rules made, issued or promulgated by the railroad commission of Washington under the provisions of chapter 81 of the Laws of 1905, or the acts amendatory thereof or supplemental thereto, shall continue in force and have the same effect as though this act had not been passed, and the public service commission hereby created is empowered to enforce said findings, orders and rules in the same manner and under the same conditions as though said findings, orders and rules had been made, issued or promulgated by the public service commission hereby created."

L's 1911, p. 612, sec. 112.

"This act, in so far as it embraces the same subject-matter, shall be construed as a continuation of chapter 81 of the Laws of 1905, and the acts amendatory thereof and supplemental thereto, and the members of the railroad commission of Washington created by said act of 1905 shall during the remainder of their terms of office respectively constitute the public service commission created by this act. At the expiration of the term of each commissioner a commissioner shall be appointed under the provisions of this act."

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant and Cross-Appellee,

vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,

Appellee and Cross-Appellant.

Petition of Appellee for Rehearing

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INDEX TO CITATIONS

	PAGE
Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad Co., 233 U. S. 479, 34 S. C. R. 641	6
Belcher v. Tacoma & Eastern Railway Co., 117 Wash. 512, 201 Pac. 750	8, 15
Denney v. Pacific Tel. & Tel. Co., 276 U. S. 97, 48 S. Ct. 223	8
Lewis v. Monson, 151 U. S. 545, 14 S. Ct. 424	7
Northern Pac. Ry. Co. v. Sauk River Lumber Co., 160 Wash. 691, 295 Pac. 926	6
Pacific Coast Elevator Co. v. Department of Public Works, 130 Wash. 620, 228 Pac. 1022	7
Pacific Tel. & Tel. Co. v. Whitcomb, 12 Fed. (2d) 279	8
Skagit County v. Puget Mill Co., 249 Fed. 965	7
State ex rel Great Northern Railway Co. v. Public Service Commission, 76 Wash. 625, 137 Pac. 132	10, 11
10 R. C. L. 702, Sec. 29	14

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For the Ninth Circuit

No. 7887

NORTHERN PACIFIC RAILWAY COMPANY,
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vs.

THE SAUK RIVER LUMBER COMPANY,
a corporation,
Appellee and Cross-Appellant.

Petition of Appellee for Rehearing

To the Honorable Judges of the above entitled court:

The appellee hereby petitions for a rehearing of this cause both on appeal and cross-appeal in this court, and submits the following in support of the application.

I.

SCHEDULE OF DATES

During 1926, logs hauled;

1926-1927, freight charges paid;

January 28, 1927, shipper's complaint filed with Department of Public Works;

July 1, 1929, findings of fact and order of Department rendered;

July 11, 1929, petition of carrier to Supreme Court of Thurston County for review of Departmental order;

February 17, 1930, order of said Superior Court reversing Department.

February 17, 1930, shipper's appeal to the Supreme Court of Washington;

February 18, 1931, decision of Supreme Court;

June 21, 1930, commencement of this action in Superior Court of Snohomish County;

July 7, 1930, order of removal to United States District Court;

March 5, 1935, judgment of District Court on verdict;

May 27, 1935, order allowing appeal to this court;

March 9, 1936, decision of this court.

During this nine year period of litigation, three decisions sustaining the shipper's claim have been made, to-wit: Departmental decision, decision of the Supreme Court of Washington, and verdict of the jury in this case and judgment of District Court rendered thereon. We do not claim that the unfortunate result of this nine year period of litigation changes the law or the application

thereof, but we do sincerely believe that the circumstances constitute a persuasive factor toward the application to the case of broad and liberal, rather than narrow and technical interpretation. It is our view that the latter type has been adopted by this court in its decision.

In the following there is submitted our contention that the decision is in error whether the spirit of liberality or that of technicality be applied.

II.

SCHEDULE OF EVENTS

From the findings of the Department, we quote the following, italicizing certain portions thereof *not* referred to in the opinion of this court.

> (P.T. 80) "The following table taken from those exhibits sets forth information pertinent to its contention and shows the 'cut off' periods during which inventories and check figures were made:

RAILWAY COMPANY'S SCALE

Period	No. of Logs	Railroad Scale (feet)	Footage added to make minimum of 6,000 ft. per car	Total footage charged for (feet)	Freight Charges Paid
12/31/25 to 6/30/26 inc.	47,866	45,097,170	495,330	45,592,500	$113,968.95
7/1/26 to 12/31/26 inc.	31,066	29,424,400	501,110	29,925,510	74,815.60
Total	78,932	74,521,570	996,440	75,518,010	$188,784.55

BUREAU SCALE AND RESULTS THEREFROM

Period	No. of logs	Board Measure Scale (feet)	No. of feet upon which frt. chgs. should be based incl. minimum	Freight Charges should be	Amount of over charge
12/31/25 to 6/30/26 inc.	48,872	42,736,230	43,464,320	$108,668.61	$5,300.34
7/1/26 to 12/31/26 inc.	31,332	27,590,050	28,330,670	70,833.31	3,982.29
Total	80,204	70,326,280	71,794,990	$179.501.92	$9,282.63

"Thus it is shown that during the entire period covered by the complaint the railway company's scale of all logs carried for the logging company amounted to 74,521,570 feet to which are added 996,-440 feet as a penalty on carloads not loaded to the required railway company's schedule minimum of 6.000 feet per car, a total of 75,518,010 feet; freight charges $188,784.55. Those figures were computed from the paid freight bills of the railway company offered as Exhibit No. 3 in this proceeding. The bureau's scale on the identical logs computed to and from the cut-off periods supra, shows the actual board measure scale with deductions was 70,326,280 feet. Making due allowance for cars not loaded to the minimum of 6,000 feet each, it increased the footage to 71,794,990 upon which the transportation charges, at $2.50 per thousand feet, should have been $179,-501.92. Thus the overcharge would be $9,282.63 as alleged by the logging company."

(P.T. 92) *"We are further of the opinion and find that all shipments of logs herein referred to, made by the complainant between the dates shown, were properly and correctly scaled by the bureau in accordance with the methods described above.*

"We are further of the opinion and find that the charges collected were unreasonable to the extent that they exceeded $179,501.92.

"We further find that complainant made the shipments as described at the charges herein found unreasonable, that it paid and bore the charges thereon, that it has been damaged thereby in the amount of the differences between the charges paid and those which would have accrued at the charges herein found reasonable; and that it is entitled to reparation and interest."

Of the findings the opinion says:

"This, obviously, is a mere statement of plaintiff's contention. It is not a finding of any fact. Instead of showing a determination by the Department of the amount of the alleged overcharge, the complaint shows on its face that there has been no such determination."

While we concede that the findings lack the formality customarily adopted by courts in making findings of fact, nevertheless we submit that the following findings of fact were clearly made by the Department, to-wit:

The freight charges amounted to $188,789.00, (P.T. 80). (This is undisputed and admitted throughout.)

The transportation charges should have been $179,501.92, (P.T. 81).

The overcharge was $9,282.63, (P.T. 81).

The Bureau's scale was correct, (71,794,990 feet), (P.T. 81 and 92).

The carrier's charges ($188,784.55) were unreasonable to the extent that they exceeded $179,501.92, (P.T. 80 and 92).

The difference between $188,784.55 and $179,501.92 is $9,282.63, (P.T. 80, 81 and 92).

So it seems to us entirely clear, whether the rule of interpretation applied be liberal or technical, that the Department found an overcharge in the exact amount sued for.

The decisions of the Supreme Court of Washington (160 Wash. 691, 295 Pac. 926, P. T. 46) found the following facts, (160 Wash. 693, P. T. 47):

> "During the year 1926 the logging company shipped logs for which it paid the railroad company freight in the sum of $188,784.55. Believing that it had been overcharged, it filed an application with the department of public works for a refund. Upon the hearing, the department found that all payments in excess of $179,501.92 were excessive, making the overcharge $9,282.63."

and at page 696, (P.T. 52):—

> "As to the amount of recovery, this is based upon the calculations of a rate and traffic expert and it appears to us to be substantially accurate."

As the Supreme Court said, (p. 695, P.T. 51):

> "It must be remembered that this is a proceeding to recover for an overcharge, and not a rate-making proceeding."

The Supreme Court of the United States, in *Baer Brothers Mercantile Co. v. Denver & Rio Grande Railroad* Co., 233 U. S. 479, 34 S. C. R. 641, pronounced the law as follows:

> "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent further injury to the public."

This principle is applied to the Washington Act (by quotation)—*Pacific Coast Elevator Co. v. Department of Public Works*, 130 Wash. 620, at 639. 228 Pac. 1022.

Whether or not the findings of the Department are definite, certainly the findings of the Supreme Court are definite and certain.

A decision of the highest court of the state upon a state statute is binding upon the Federal Courts. When that decision involves the identical matter which comes before the Federal Courts, the state decision is not only binding on points of law but is *stare decisis* on the facts. This doctrine is not limited to state decisions interpreting statutes. It goes further and covers the state court's interpretation of a state statute as bearing upon an order of a subordinate state tribunal.

In *Skagit County v. Puget Mill Co.,* (C. C. A. 9th), 249 Fed. 965, the Supreme Court of the State in construing a state statute had held that a certain notice must be given to the taxpayer. In the cited case it was urged that the decision of the Supreme Court should be regarded as *obiter dictum.* This court held otherwise, saying:

> "But as the court deliberately considered and construed the clause of the statute which relates to a notice fixing a date certain for the appearance of the property owner, we abide by the construction given."

The court cited the case of *Lewis v. Monson,* 151 U. S. 545, 14 S. Ct. 424, in which the language of court is:

> "The determination of any questions affecting them (referring to state statutes) is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the federal constitution has been invaded."

Belcher v. Tacoma & Eastern Railway Co., 117 Wash. 512, 201 Pac. 750, involved an action brought by the shipper against the carrier. It seems that there had been three previous decisions of the Supreme Court of Washington upon the dispute between the parties. The opinion refers to them and says:

> "We take it that the law of this case has been established by these prior decisions and it would be acarpous to again review the many intricate questions involved."

In *Pacific Tel. & Tel. Co. v. Whitcomb*, 12 fed. (2d) 279, it was contended by the public service corporation that an order of the Washington State Department in fixing new rates did not terminate the old rates. The opinion (of three judges) refers to a previous decision of the Supreme Court of Washington holding that the order of the Department of Public Works in question was just as effective as if there had been an express provision terminating existing rates and holding that to be the legal effect of the order and that the form or language used is not very material. The court considered the Washington decision aforesaid and said of it:

> "This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court."

We understand this to be a clear holding that a decision of the Supreme Court of the state as to the interpretation of an order of the Department made under a state statute is the construction of a state statute, and consequently binding upon the federal courts.

The case last cited was carried to the Supreme Court of the United States and is reported in 276 U. S., p. 97, 48 S. Ct. 223, in which the proposition here under consideration was stated in the following language:

> "The powers and duties of the Department of Public Works and the effect of its orders must be ascertained upon a consideration of the local Constitution and statutes, and the construction placed upon them by the state courts."

If the above quoted findings of the State Supreme Court were made in the exercise of its judicial or quasi-judicial jurisdiction, the point is as clear as day, i.e. that its decision is *stare decisis.* If, however, it should be assumed that the findings were made by the Supreme Court under its quasi-legislative jurisidiction, they were made in the exercise of its appellate jurisdiction. In rendering its decision it surely had to interpret the findings and order of the Department. In other words, in determining whether the findings and order of the Department should be affirmed or reversed, it had to *first understand, interpret and pass upon the findings and order.* In so doing (as the before quoted language of the opinion clearly shows), it interpreted the findings and order, and adjudicated that the Department found as facts:

1. That the total charge was $188,784.55;
2. That it should have been $179,501.92; and,
3. That the overcharge was $9,282.63.

Therefore, it is evident that this court has erred in holding that sufficient foundation had not been laid to authorize the commencement of this action in the Superior Court of Snohomish County, and the maintaining the same in the District Court.

We are not overlooking the fact that the Department, after finding specifically the amount of the overcharge, followed the said specific findings by an order as follows:

> (P. T. 92) "IT IS ORDERED, That the above named respondent be, and it hereby is, notified to pay

to the Department of Public Works in accordance with Chapter 110, Laws of 1921 (Rem. Comp. Stat. 10436) as reparation all sums in excess of the sum of $179,501.92 paid by complainant to respondent on logs shipped from Darrington to Everett between December 31, 1925, and January 1, 1927, together with interest from date of collection."

"The parties hereto are directed to ascertain from the records the exact amount of reparation due under this order and to communicate the same to the Department. Jurisdiction is hereby reserved by the Department to enter a further order, requiring the payment of reparation by respondent to complainant in the sum agreed upon by the parties, or, if the parties are unable to agree then in such sum as the Department may find is in fact due; and to make such other and further orders as are necessary in the premises."

Now the last paragraph of the order may have been intended to leave it open for the parties to compromise upon a smaller amount in order to avoid further litigation of the subject matter, but it is respectfully submitted that this unnecessary language does not detract from the fact that the Department found an overcharge in a certain fixed sum and ordered the payment of that amount by the carrier.

However intended, the first paragraph of the order is a definite and certain direction for the payment of a certain, fixed sum (especially in view of the specific findings preceding and expressly made a part of the order). Certainly, it is the first paragraph which is controlling and not, as the opinion assumes, the second. If not so, the most to be said against the order is that it is somewhat ambiguous.

Pertinent at this point is the decision in *State ex rel Great Northern Railway Co. v. Public Service Com-*

mission, 76 Wash. 625, 137 Pac. 132, wherein the order (made November 18, 1911) directed that joint rates be put in force, but further provided that the railway companies were given ten days to comply with the terms of the order, the court at page 628 thus describing the order:

> "It being further provided that in case of their failure so to agree, the Public Service Commission would itself, by a supplemental order, establish such rates and fix the division between the respective carriers."

The opinion holds that this order was subject to review by the state courts under the statute and in the course of the opinion the court says (p. 629):

> "At all events, the order of November 18th was a final order to all intents and purposes. It fully covered and disposed of the matter before the Commission. It required nothing to make it effectual, and, had it been complied with by appellants (the railroad companies) would have ended the matter. That it did not end the matter was not because of its lack of finality, but because appellants, having failed to observe its mandate, subsequent action to enforce it became necessary on the part of the Commission."

III.

SUBSEQUENT DEVELOPMENTS

The subsequent history of the matter is such as to clearly preclude the carrier from claiming that the findings and order did not constitute a sufficient basis for the commencement of the action in Snohomish County.

It seems to us that the findings and order fixed the amount of the overcharge and directed its payment, and the paragraph of the order last quoted, properly con-

sidered, did not detract from the force of the court's finding of fact and order of payment. No more could be said against it than that it rendered the intent ambiguous. If so, it is familiar law that the construction placed upon the order by the parties affected thereby is of supreme importance in the interpretation of the order.

The first step thereafter taken by the carrier was to file (ten days later) a petition to the Superior Court of Thurston County to review the Departmental order. Why was such petition filed, unless the carrier regarded the finding and order of the Department as complete and final? Was its purpose that if the courts (Superior and Supreme) should affirm the Departmental order thereupon the Department would enter another order saying in substance that the carrier is ordered to pay the $9,282.63, and thereupon the carrier would seek a review of this latter order and carry that through the state courts so that in the meantime the shipper would have no right to sue in one of the Superior Courts to recover the $9,282.63? Such purpose on the part of the carrier is inconceivable in fact, but at any rate would be untenable in a court.

The carrier's next step was to remove the case from the Snohomish County court to the United States District Court, interposing (P. T. 62) a motion to dismiss on the ground that it appears from the complaint that the plaintiff has no cause of action. This motion was not pressed, and it seems not to have been passed upon. In its petition for removal (P. T. 9), it alleged that "this action is to recover on an interlocutory order made by the Department of Public Works on July 1, 1929, that petitioner pay to the Department of Public Works the sum of $9,282.63 on account of reparation for alleged overcharges on shipments of logs made by the plaintiff, Sauk River

Lumber Co., on the railroad of defendant." Then the plaintiff interposed a motion to remand, and the carrier opposed it, obtaining from Judge Neterer an order (P. T. 13) denying the petition, Judge Neterer rendering a decision in which he held that the jurisdiction of the Department and the state courts had been exhausted, and an independent judicial right created, predicted upon the findings which are presumptively right.

The carrier's next step was to interpose its answer in which it expressly admitted (P. T. 23, 24), that the amount of its charges was the sum of $188,784.55, and that (P. T. 24) the Department made the findings and order, copy of which is attached to the complaint. In the answer (P. T. 32) it is affirmatively alleged that the freight charges collected were $188,784.55. On the same page it impliedly admits the amount of the difference between the actual and the proper freight charge, to-wit, $9,282.63.

Its next step was to file an amendment (Paragraph XIV) to the answer (P. T. 66), charging that the hearing, findings of fact, and order of the Department, are void for the reason that the Department was acting in a judicial capacity and had an interest in the outcome.

> "That the Department did, in said hearing and order, purport to adjudge unto itself 10% of its award, or the sum of $928.26."

As the case was approaching trial in the District Court, the carrier made a motion for dismissal (P. T. 62), in which, for the first time, it advanced the claim that the Department's order was not final because the parties had not yet ascertained the exact amount of reparation. Therefore, the carrier's theory in the motion is (as we understand it) that the jurisdiction of the Department has not been exhausted, (contrary to Judge Neterer's

decision, P. T. 15, 16), and therefore recourse to the courts was premature. This motion was denied by Judge Bowen, (P. T. 64). During the trial, the carrier interposed an oral motion to dismiss (P. T. 73) based upon the alleged absence of jurisdiction, the ground asserted being that the "order of reparation here involved" was void because the Department was disqualified (on account of the 10%), the carrier stating that the motion was predicated upon the matters alleged in the fourteenth paragraph of the Answer. See P. T. 66 wherein the fourteenth paragraph is set forth. It has been hereinbefore discussed. In this connection it is worthy of remark that if the Departmental order was not final, the 10% point would be premature.

It is respectfully submitted that this course of conduct on the part of the carrier is such as to preclude it from advancing in either the District or to this court any claim that the Departmental order was not sufficient to support this action.

It may be laid down as a general rule that a party will not be allowed in a subsequent judicial proceeding to take a position in conflict with the position taken by him in a former judicial proceeding, where the latter position is to the prejudice of the adverse party, and the parties and questions involved are the same.

10 R. C. L. 702, Sec. 29.

The carrier sought and had a review of the departmental order on the theory that the department made a finding of the amount of the overcharge and an order for its payment. That certiorari proceeding having come to an end by the decision of the Supreme Court, the carrier is not permitted in this later action to take a contradictory position.

In passing, the atention of the court is called to the fact that in the amended reply (P. T. 60), the point is made that the carrier could have presented to the Superior and Supreme Courts the defenses interposed in the District Court, and having a choice of two remedies it elected to assert its defenses before the Superior Court of Thurston County and the Supreme Court of the state.

IV.

CONCLUSION

If the present ruling of the court is to stand, the only procedure open to the shipper is to apply to the Department for a further order. It follows that the court's said ruling is in effect an order of dismissal. Therefore this court should by a further opinion or by explicit language in the mandate see to it that the dismissal will be without prejudice to the shipper's right to apply for such further order and then to commence action in a proper Superior Court to collect the sum due. Such would be in accord with precedent. See *Belcher v. Tacoma & Eastern Railway Co.,* 99 Wash. 34, at 46, 201 Pac. 750.

Respectfully submitted,

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No. 7986

United States
Circuit Court of Appeals

For the Ninth Circuit.

OAKLAND HOTEL COMPANY, a Corporation,
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE & JAMES A. WAINRIGHT,
Appellees.

Transcript of Record

Upon Appeal from the United States District Court for the Northern District of California,
Southern Division

PACIFIC BRIEF PRINTING CO., BERKELEY—SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Account of temporary trustee—Oct. 23, 1934 to May 31, 1935 186

Account and report of trustee and petition for compensation 181

Account, supplemental, of trustee 208

Account, second supplemental, of trustee 211

Account, third supplemental, of trustee 235

Affidavit of mailing notices to creditors and stockholders, re; hearing proposed plan of reorganization 121

Affidavit of publication; re hearing proposed plan of reorganization 124

Affidavit of publication notice to stockholders and creditors, re; filing of claims 163

Affidavit of mailing notices to stockholders and creditors; re filing of claims 137

Affidavit of mailing notice to stockholders re; appointment of permanent trustee 59

Affidavit of mailing notices to creditors; re appointment of permanent trustee 46

Index

Page

Affidavit of James A. Wainwright 66

Answer by creditors to debtor's petition 73

Answer of temporary trustee to debtor's objections to appointment 43

Answer of creditors to exceptions to report of of special master 198

Appellant's designation of portions of record to be printed 452

Appellees' designation of portions of record to be printed 454

Assignment of errors 240

Assignments of error on petition for appeal 447

Bond for costs on appeal 245

Bondholders memorandum in opposition to petition for compensation filed by attorneys for debtor 215

Clerk's certificate 437

Citation on appeal 451

Creditor's answer to debtor's petition 73

Creditor's memorandum relating to debtor's objections to hearing 168

Creditor's opposition to debtor's request for order placing debtor in possession 64

Index

Page

Creditor's opposition to confirmation of debtor's plan of reorganization 128

Debtor's motion to dismiss creditors' answer to debtor's petition 86

Decree overruling exceptions to special master's report, confirming report and dismissing proceedings 221

Exceptions of debtor to report of special master recommending dismissal 176

List of known bondholders and creditors 49

List of stockholders 62

List of stockholders and creditors 141

Motion to dismiss Creditors' answer to debtor's petition 86

Notice to creditors and stockholders; re; hearing proposed plan of reorganization 122

Notice of motion to hear objections by debtor to appointment of temporary trustee 42

Notice to stockholders; re appointment of permanent trustee 60

Order allowing exceptions to report of special master 174

Order allowing compensation and reimbursement for expenses of attorneys for bondholders 223

Index

Page

Order allowing temporary trustee's account allowing compensation 214

Order appointing temporary trustee 33

Order approving debtor's petition 32

Order approving debtor's petition and appointing temporary trustee 33

Order authorizing temporary trustee to employ attorney 37

Order continuing trustee in possession of debtor's property and determining time within which plan of reorganization must be filed..... 103

Order denying petition of attorneys for debtor for fees and reimbursement 224

Order denying petition for rehearing, denying renewed petition for payment of attorneys' fees 235

Order discharging temporary trustee..... 238

Order fixing date for filing of claims and division of creditors 134

Order fixing time and place of hearing proposed plan of reorganization and directing notice 119

Order referring specified issues to special master 83

Index

Page

Order referring specified issues to special master 131

Orders staying proceedings 225

Objections of debtor to sufficiency of creditors' answer and motion to dismiss 97

Objections by debtor to order appointing temporary trustee and supplemental orders..... 38

Petition by debtor for relief under section 77B.. 2

Petition by attorneys for creditors for payment of attorneys' fees and reimbursement.. 187

Petition by attorneys for debtor for payment of attorneys' fees and reimbursement..... 203

Petition by attorneys for debtor for rehearing and motion to recommit to special master 226

Petition for appeal 244

Petition for appeal..... 438

Plan of reorganization proposed by debtor..... 110

Receiver's receipt 239

Reply by attorneys for bondholders etc. to debtor's petition for rehearing and motion to recommit to special master..... 230

Index

Page

Report of special master, that debtor be given time to file plan of reorganization..... filed Dec. 27, 1934..... 89

Report, supplemental, of special master recommending date by which plan of reorganization should be filed..... 96

Report of special master recommending dismissal—filed June 6, 1935..... 170

Special master's report, recommending that debtor be given time to file plan of reorganization 89

Special master's supplemental report recommending date by which plan of reorganization should be filed..... 96

Stipulations as to consolidation of appeals and forwarding original exhibits 247-249

Stipulation for use of original exhibits..... 456

Temporary trustee's statement of points, etc., in reply to objections to appointment..... 43

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In the District Court of the United States for the Northern District of California, Southern Division.

In the Matter of the Application of

OAKLAND HOTEL COMPANY

Under Section 77B of an Act of Congress of the United States of July 1, 1898, entitled: "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES, AS AMENDED JUNE 7, 1934".

PETITION TO BE ALLOWED TO OBTAIN THE RELIEF PROVIDED BY SAID SECTION 77B.

Your petitioner respectfully shows this court:

I.

That OAKLAND HOTEL COMPANY is and has been at the times mentioned herein, a corporation duly organized and existing under and by virtue of the laws of the State of California;

II.

That the Board of Directors of said Oakland Hotel Company consists of five (5) directors, W. C. JURGENS, C. H. JURGENS, C. J. HEESEMAN, J. Y. EGGLESTON and A. G. TASHEIRA, all of Oakland, California;

III.

That under Section 12 of the By-Laws there shall

be thirty thousand (30,000) shares of stock of the par value of One Hundred ($100.00) Dollars each, of which ten thousand (10,000) shares shall be preferred stock, and twenty thousand (20,000) shares of common stock; that the total number of shares issued, as shown by the books of the corporation today, are: Preferred shares, 8,644, and common, 486. [1*]

IV.

That your petitioner, OAKLAND HOTEL COMPANY, has had its principal place of business and its principal assets in the territorial jurisdiction of this court during six months preceding the filing of this petition and ever since its incorporation;

V.

That the nature of the business of your petitioner is owning and operating the Hotel Oakland in the City of Oakland, County of Alameda, State of California;

That the Hotel Oakland occupies the entire block surrounded by Thirteenth and Fourteenth Streets and Harrison and Alice Streets; that the size of the lot upon which the Hotel Oakland is situated is 200 x 300 feet;

That said Hotel Oakland is a first-class hotel and has been operated as such from its beginning; that the Hotel Company was organized and the hotel was built for the purpose of establishing a first class

*Page numbering appearing at the foot of page of original certified Transcript of Record.

hotel in the City of Oakland which should be the center of the business and social activities of the city; that the said Hotel Oakland has been such center and has been operated as such first class hotel until the financial difficulties hereinafter related;

VI.

That THE CHAS. JURGENS CO., is and has been during the times mentioned herein, a corporation duly organized and existing under and by virtue of the laws of the State of California;

That The Chas. Jurgens Co. consists of the heirs of Charles Jurgens, one of the pioneer residents of Oakland and one of the leading realtors and merchants of that city;

That The Chas. Jurgens Co. took over the control of the Oakland Hotel Company by stock purchase in December, 1917; that [2] it now owns and controls three hundred eighty-eight (388) shares of common stock of Oakland Hotel Company, and eight thousand two hundred eighty-seven (8,287) shares of preferred stock; that after The Chas. Jurgens Co. obtained control of Oakland Hotel Company, the Oakland Hotel Company managed and operated the Oakland Hotel through its afterward President, W. C. JURGENS, who devoted his whole time and attention thereto; that it was the pride of himself and his family, who were residents of Oakland all their lives and were among the builders of that city; that W. C. Jurgens is one of the outstanding hotel men of the United States

and was recently appointed one of the committee of five to administer the Hotel Men's Code in the United States and served fifteen months in Washington, D. C., on that committee; that the Hotel Oakland was originally projected by the citizens of that community as a matter of civic pride, to which they subscribed the stock, but it was not until the stock was taken over by The Chas. Jurgens Co. that the hotel was operated at a profit; W. C. Jurgens then became Manager of the hotel and remained so until the depression occurred, at which time he became seriously ill; during this time, through his efforts, Ninety Thousand ($90,000.00) Dollars worth of bonds were retired and the hotel showed a profit over operating expenses and was recognized as a leading hotel of the county; that during the stewardship of W. C. Jurgens the north side of the seventh floor, which was an open loft, was converted into hotel rooms and baths, fully furnished and equipped, at a cost of more than Fifty thousand ($50,000.00) Dollars; that for the subsequent seven years after the stock of Oakland Hotel Company was purchased by The Chas. Jurgens Co., and the management of the Hotel Oakland passed into the hands of W. C. Jurgens, the [3] operating profit amounted to Eight Hundred Sixty-eight Thousand Three Hundred Sixty-three and 09/100 ($868,363.09 Dollars, and after deducting all taxes, insurance, bond interest and depreciation in equipment, netted a profit of One Hundred Thirty-nine Thousand and Eighty-one and 74/100 ($139,081.74) Dollars;

That the Asset Value of the hotel property has been greatly enhanced dueing the management of W. C. Jurgens;

That the Land Value of the property, shown on the Balance Sheet as costing Two Hundred Twenty-seven Thousand One Hundred Thirty-one and 79/100 ($227,131.79) Dollars, is assessed for Two Hundred Sixty Thousand, Five Hundred and Fifty ($260,550.00) Dollars; that based on the fact that the block in which the new Post Office building is situated diagonally across Thirteenth Street from the hotel, is the same size, 200 x 300 feet, and was purchased by the United States Government in 1932 for $550,000.00 the present value of the hotel block is conservatively estimated to be Seven Hundred and Fifty Thousand ($750,000.00) Dollars; that the building which cost One Million Three Hundred and One Thousand Nine Hundred Fifty-five and 01/100 ($1,301,955.01) Dollars should be valued at nearly its cost to build today, for the reason that up to the time of the financial difficulties hereinafter related, it was kept in excellent condition by Oakland Hotel Company; that during this period of operation, the Oakland Hotel was administered in a businesslike economic fashion, in accordance with the custom of all hotels of its class throughout the country and that it bid fair to make an adequate return upon the investment;

VII

That in the year 1910 a bond issue had been authorized by its stockholders and directors, by in-

denture dated [4] January 1, 1910, and recorded on August 7, 1911, in Liber 1960 of Deeds, at page 1 thereof, Records of Alameda County; that the said trust was placed with the First Federal Trust Company of San Francisco, now the Crocker First Federal Trust Company of San Francisco;

That the amount of bonds issued was Seven Hundred and Fifty Thousand ($750,000.00) Dollars; that during the management by W. C. Jurgens of Oakland Hotel Company, $90,000. worth of said bonds were retired, and there still exists Six Hundred and Sixty Thousand ($660,000.00) Dollars of said bonds outstanding against the property of Oakland Hotel Company; that most of its bonds have been deposited with a Depositors' Committee, so-called, under an agreement with the Bondholders, dated December 21, 1931, constituting R. W. KINNEY, E. J. SOULE and JAMES A. WAINWRIGHT as such committee, all of Oakland, California;

VIII.

That when the recognized depression came, beginning with the latter part of 1929 and extending into subsequent years, the business of the Oakland Hotel Company, like that of all hotels of its class in the country, fell off, its patrons and lessees could no longer pay the prices which they had hitherto paid; the associations which had assisted in promoting the hotel and had been occupying space therein and paying high rentals, discontinued their leases, and through no fault of the management,

the Hotel Oakland suffered as other hotels suffered throughout the country;

IX.

That The Chas. Jurgens Co. had advanced on notes of hand to the Oakland Hotel Company up to June 15, 1931, the sum of Two Hundred Forty-four Thousand Five Hundred ($244,500.) Dollars, which money had been expended in enhancing the value [5] of the hotel property, and The Chas. Jurgens Co. also took over Sixty-one Thousand Seven Hundred Eighty-four and 22/100 ($61,784.22) Dollars of trade accounts which were owing by the Oakland Hotel Company, making a total debt of Three Hundred Eight Thousand Seven Hundred Eight and 22/100 ($308,708.22) Dollars which the Oakland Hotel Company owed to The Chas. Jurgens Co. by November, 1931. The Chas. Jurgens Co. at this time was the owner of a large amount of valuable real estate in the City of Oakland which had depreciated by reason of the depression. It was impossible, therefore, for The Chas. Jurgens Co. to advance any more money to the Oakland Hotel Company;

The Chas. Jurgens Co. however, on November 2, 1931, executed a Deed of Trust to the Central National Bank of Oakland to protect the trade accounts that were owing at that time by the Hotel Oakland, and to protect the tradesmen of the City of Oakland, and placed in that deed of trust an amount of real property in value far in excess of the amount of the trades accounts owing by the Oak-

land Hotel Company, in the sum of Sixty-one Thousand Seven Hundred Eighty-four and 22/100 ($61, 784.22) Dollars and the amount advanced by Central National Bank of Oakland in the sum of One Hundred One Thousand Five Hundred ($101,-500.00) Dollars, which property was appraised in 1926 for Federal Estate Tax purposes in the Matter of the Estate of Charles Jurgens and fixed at Eight Hundred Forty-four Thousand Four Hundred Twenty-five ($844,425.00) Dollars, and was appraised by the Central National Bank of Oakland in 1932 at Three Hundred Twenty-five Thousand Eight Hundred Twenty-five ($325,825.00) Dollars; Thereafter The Chas. Jurgens Co. decided it would be impossible for them to carry on any longer the Oakland Hotel Company and could make no further loans. [6]

X.

Thereupon the Bondholders of Oakland Hotel Company on January 12, 1932, placed their committee, consisting of R. W. Kinney, E. J. Soule and James A. Wainwright in possession of the property of the Oakland Hotel Company representing the trustee, The Crocker First Federal Trust Company; that thereafter, on the 19th day of January, 1932, an action was commenced by the First Federal Trust Company, as Trustee, against Oakland Hotel Company for a Receiver to administer the property of the Oakland Hotel Company until a foreclosure could be had; the Bondholders went into

possession and the action was commenced, based upon the two following events of default, as set forth in the notice of the Trust Company, dated January 12, 1932, by virtue of which the Committee took possession of the property;

> "The undersigned specified that at least the two following events of default have heretofore happened, to-wit: (a) that default has been made in the payment of the installment of interest due July 1, 1931, on the bonds secured by said Indenture, and that such default in payment has continued for six months; and (b) default has been made in the payment of taxes and in the performance and observance of the covenants, promises and conditions on the part of Oakland Hotel Company in that regard, as in said Indenture contained, and such default has continued for six (6) months after written notice from the undersigned to said Oakland Hotel Company."

That by reason of said depression and the inability of The Chas. Jurgens Co. to refinance the operation of the hotel, the Oakland Hotel Company cooperated with the Trustee under the Deed of Trust and turned over the properties and management of the hotel to the Receiver;

Said Receivership is still pending in the Superior Court of the State of California, in and for the County of Alameda, and is entitled: "First Federal Trust Company vs. Oakland Hotel Com-

pany, No. 122,289", but nothing has happened [7] under said Receivership except that a Receiver has been carrying on the hotel property as a second or third class hotel, and said Receiver has borrowed the sum of Ten Thousand ($10,000.00) Dollars to replace some of the equipment;

That the hotel is being carried on at the present time merely to maintain its status quo until a sale can be obtained, and it is alleged upon information and belief that it is the intention of the Bond Committee to sell the hotel properties as soon as possible at a price far less than the value of the real estate upon which the hotel stands. In other words, that it is the intention of the Bond Committee to sacrifice the property rather than to carry on the hotel as a going concern and attempt to rehabilitate and restore the property to its former income paying basis; that if a sale were made at the present time under the depressed realty market in the City of Oakland, it would disastrously affect real estate values in the City of Oakland, particularly as the bonds of Oakland Hotel Company are now selling at thirty cents on the dollar;

That it is alleged on information and belief that in at least one instance the Bondholders' Committee offered to a prospective purchaser to submit to the bondholders a proposition to sell the property consisting of the real estate, building, furniture, fixtures and equipment of Hotel Oakland for Four Hundred Thousand ($400,000.00) Dollars, net, to the bondholders, the purchaser to pay all past due

taxes and the current taxes; that in making the offer a tempting one, the Bond Committee stated that the property was reappraised for insurance purposes at One Million One Hundred Thousand Dollars ($1,100,000.00); and the equipment at $170,000.00, and that the investment represents Two Million Dollars ($2,000,000.00). [8]

XI.

That the creditors of the Oakland Hotel Company are the bondholders, as set out above, eighty-seven percent (87%) of whom have deposited their bonds with the Bondholders' Committee under the Bondholders' Protective Agreement of December 21, 1931; the amount of the bonds outstanding is Six Hundred and Sixty-Thousand ($660,000.00) Dollars; that the real property itself, unless sacrificed, is more than sufficient to satisfy these bonds; that the other creditors are The Chas. Jurgens Co., in the sum of Three Hundred and Eight Thousand Seven Hundred Eight and 22/100 ($308,708.22) Dollars; total taxes on the property with penalties and interest, amount to Seventy-four Thousand Seven Hundred Eighty-six and 46/100 ($74,786.46) Dollars, at the last estimate;

That there are nominal creditors of the Oakland Hotel Company who were the tradespeople when W. C. Jurgens retired from the management and were owed Sixty-one Thousand Seven Hundred Eighty-four and 22/100 ($61,784.22) Dollars at that time; but that as stated herein, their claims are fully protected by the Deed of Trust to the Central

National Bank executed by The Chas. Jurgens Co. on the 2nd day of November, 1931, and are fully set forth therein, and they participate in said Deed of Trust and Notes secured therewith by certificates endorsing on the face thereof the proportionate benefit each of said creditors has in the Deed of Trust and Notes secured thereunder.

XII.

The Assets, Liabilities, Capital Stock and financial status of the debtor may be found at once by reference to Schedules "A", "B" and "C", annexed hereto;

Schedule "*A*" is the corporate Income Tax Return of [9] Oakland Hotel Company, filed by Henry Barker, Receiver for the Bondholders thereof, for the year 1933;

Schedule "B" is a statement of the condition of receivership of Henry Barker, Receiver, to July 31, 1934;

Schedule "C" is the Report of the Receiver for the Hotel Oakland for the month of August, 1934, comparing it to the month of August, 1933, and the Income of the year 1934, down to the end of August, which compares the income of 1933 down to the end of August;

That it appears from these statements that the corporation, debtor, is insolvent at the present time and unable to meet its debts as they mature, but that the hotel corporation has a very large equity in the land, building and equipment of the hotel;

that it appears from these figures that a plan of reorganization may be worked out which would enable it to pay its creditors, bondholders and its stockholders a much larger sum than will be realized if the property is sacrificed at once under the receivership proceedings now pending and under the sale which is threatened. That the need for relief is immediate;

XIII.

That the Hotel corporation, debtor, desires to effect a plan of reorganization which it will present to the court; that it has a tentative plan of reorganization that it will present to the court at the proper time;

That by resolution, duly passed at a meeting of the board of directors of Oakland Hotel Company, on the 24th day of September, 1934, duly and legally held after due notice under the By-laws, it was resolved that this corporation take immediate proceedings under Section 77B of the Bankruptcy Act [10] of the United States to effect this plan of reorganization and to be restored to the possession of its property and to effect a plan of reorganization, which resolution is hereto appended and marked Exhibit "D";

That on the same date The Chas. Jurgens Co. at a meeting of the stockholders, passed a resolution, as the owner of ninety (90%) percent of the stock of Oakland Hotel Company, to the same effect, previous to the time of the meeting of the directors of

the Oakland Hotel Company, which resolution is hereby appended and marked Exhibit "E";

XIV.

That the Oakland Hotel Company, debtor corporation herein, Petitioner, desire to be put in immediate possession of the property so that it may take over immediately the operation of the hotel;

That it desires to do this for the reason that the petitioner considers that the operation of the hotel can be improved so as to bring in more revenue and that its status be restored as a first class hotel in the City of Oakland and as the center of the business and social life of that community; that the operation of the hotel at the present time is merely being carried on so as to maintain the property with the object of selling it as soon as possible;

That the sooner the Oakland Hotel Company is restored to the possession and operation of the Hotel Company, the sooner may the objects of this petition be attained;

WHEREFORE, the petitioner, OAKLAND HOTEL COMPANY, prays for an Order restoring it immediately to possession of the property of Oakland Hotel Company and that the Receiver of the property, now in possession, be ordered to transfer [11] the property to the possession of Oakland Hotel Company under Paragraph I of Section 77B of the Act, and that the Court make such other Orders as are necessary to provide for the hearings and notices required by the Act and all necessary

Orders for the staying of pending suits against the debtors or enjoining or staying of the commencement or continuing of suits against the debtor and the preventing of any enforcement of any lien against the debtor estate.

HOTEL OAKLAND COMPANY
By W. C. Jurgens, Pres.
Petitioner.

[Verification] [12]

Exhibit "A"

1933 Corporation Income Tax Return—OAKLAND HOTEL COMPANY filed by Henry Barker, RECEIVER for BONDHOLDERS thereof.

1933—Beginning of Taxable Year.

BALANCE SHEET	Books of OAKLAND HOTEL COMPANY		Books of HENRY BARKER, RECEIVER		TOTAL	
ASSETS	**Amount**	**Total**	**Amount**	**Total**	**Amount**	**Total**
Cash	$	$ 213.95	$	$ 7,896.23	$	$ 8,110.18
Notes Receivable		1,657.40				1,657.40
Accounts Receivable	4,075.68		10,916.81		14,992.49	
Less—Reserve for Bad Debts	1,700.33		238.72		1,939.05	
		2,375.35		10,678.09		13,053.44
Inventories:						
Footstuffs	36.32		2,083.48		2,119.81	
Beverages			408.62		408.62	
Supplies	483.04		1,868.89		2,351.93	
		519.37		4,360.99		4,880.36
Deferred Charges						
Prepaid Insurance	227.64		4,038.56		4,266.20	
Deferred Taxes & Licenses	16,489.08		283.01		16,772.09	
Redecorating Halls & Lounges			1,214.10		1,214.10	
		16,716.72		5,535.67		22,252.39
Capital Assets						
Land	227,131.79				227,131.79	
Building	1,301,955.01				1,301,955.01	
Furniture, Fixtures & Equipment	313,022.03		16,048.52		329,070.55	
	1,842,108.83		16,048.52		1,858,157.35	

Less—Reserve for Depreciation	759,965.22	1,082,143.61	2,253.83	13.794.69	762,219.05	1,095,938.30
Franchise		100.00				100.00
		$1,103,726.40		$ 42,265.67		$1,145,992.07
LIABILITIES						
Accounts Payable		$ 76,580.54		$ 14,307.00		$ 90,887.54
Pay Roll				6,775.41		6,775.41
Notes Payable		244,500.00				244,500.00
Mortgages		660,000.00				660,000.00
Reserve for Alterations, Rooms 786-90				412.03		412.03
Note Interest due		24,575.49				24,575.49
Bond Interest due		79,200.00				79,200.00
Taxes due		84,199.93				84,199.93
Preferred Stock	864,400.00				864,400.00	
Common Stock	100.00	864,500.00			100.00	864,500.00
PROFIT & LOSS	[RED]	$ 929,339.56		20,771.23	[RED]	909,058.33
		$1,103,726.40		$ 42,265.67		$1,145,992.07

1933 Corporation Income Tax Return—OAKLAND HOTEL COMPANY filed by Henry Barker. RECEIVER for BONDHOLDERS thereof.

1933—End of Taxable Year.

ASSESTS	Books of OAKLAND HOTEL COMPANY Amount	Total	Books of HENRY BARKER, RECEIVER Amount	Total	TOTAL Amount	Total
Cash	$	$ 172.62	$	$ 13,419.41	$	$ 13,592.03
Notes Receivable		1,500.00				1,500.00
Accounts Receivable	1,901.45		13,219.73		15,121.18	
Less—Reserve for Bad Debts		1,901.45	822.38	12,397.35	822.38	14,298.80
Inventories:						
Foodstuffs	26.33		2,694.45		2,720.78	
Beverages			3,509.61		3,509.61	
Supplies	356.16	382.49	2,200.50	8,404.56	2,556.66	8,787.05
Deferred Charges						
Prepaid Insurance	51.21		2,477.98		2,529.19	
Deferred Taxes & Licenses	14,298.30		294.01		14,592.31	
Redecorating Hall & Louges		14,349.51	867.30	3,639.29	867.30	17,988.80
Capital Assests						
Land	227,131.79				227,131.79	
Building	1,301,955.01				1,301,955.01	
Furniture, Fixtures & Equipment	304,525.08		25,332.21		329,857.29	
	1,833,611.88		25,332.21		1,858,944.09	

Less—Reserve for Depreciation	808,118.69	1,025,493.19	6,548.61	18,783.60	814,667.30	1,044,276.79
Franchise		100.00				100.00
		$1,043,899.26		$ 56,644.21		$1,100,543.47
LIABILITIES						
Accounts Payable		$ 76,001.01		$ 17,304.93		$ 93,350.94
Pay Roll				8,059.14		8,059.14
Notes Payable		244,500.00		10,000.00		254,500.00
Mortgages		660,000.00				660,000.00
Reserve for Alterations, Rooms 736-90				288.23		288.23
Note Interest Due		39,245.49				39,245.49
Bond Interest Due		118,800.00				118,800.00
Taxes Due		91,894.07				91,894.07
Preferred Stock	864,400.00					
Common Stock	100.00	864,500.00				864,500.00
PROFIT & LOSS	[RED]	1,051,041.31		20,991.91	[RED]	1,030,049.40
		$1,043,899.26		$ 56,644.21		$1,100,543.47

Exhibit "B" Exhibit "1"

HOTEL OAKLAND — HENRY BARKER, RECEIVER
STATEMENT OF CONDITION OF RECEIVERSHIP
July 31st, 1934

ASSESTS		DETAIL		AMOUNT
		$	$	$
Current Assests:				17,343.49
Cash on Hand			3,863.99	
Cash in Bank: Cent'l Nat'l	1,900.14			
" Bank	5,384.66		7,284.80	
Guests Ledger		7,307.62		
Less Deserve for Bad Debts		1,157.53	6,150.09	
Sundry Accounts Receivable			44.61	
Inventories:				7,122.65
Foodstuffs		2,673.89		
Beverages		2,848.57		
Supplies		1,600.19		
a) **New Equipment:** Net Depreciated Value				18,249.85
Carpets		7,094.03		
Less—Allowance for Depreciation		1,801.74	5,292.29	
Crockery		1,503.32		
Less—Allowance for Depreciation		895.30	608.02	
Electrical Work		64.00		
Less—Allowance for Depreciation		12.00	52.00	
Engineers Equipment		648.95		
Less—Allowance for Depreciation		91.25	557.70	

Flags and Banners	150.49	
Less—Allowance for Depreciation	31.30	119.19
Furniture & Fixtures	3,231.55	
Less—Allowance for Depreciation	799.95	2,431.60
Glassware	2,175.62	
Less—Allowance for Depreciation	1,356.90	818.63
Kitchen Equipment	475.67	
Less—Allowance for Depreciation	214.12	261.55
Linen	5,201.97	
Less—Allowance for Depreciation	2,748.73	2,453.24
Multigraph	2,173.64	
Less—Allowance for Depreciation	794.27	1,379.37
Natural Gas Equipment	1,464.06	
Less—Allowance for Depreciation	307.80	1,156.26
Plumbing	950.99	
Less—Allowance for Depreciation	77.12	873.87
Public Address System	643.05	
Less—Allowance for Depreciation	106.89	536.16
Radio	112.50	
Less—Allowance for Depreciation	16.38	96.12
Sample Room	230.00	
Less—Allowance for Depreciation	46.08	183.92
Silverware	647.58	
Less—Allowance for Depreciation	340.00	307.58

Tavern	1,478.15		
Less—Allowance for Depreciation	355.80	1,122.35	
Deposits and Deferred Expenses:			4,013.79
Insurance—Deposits		100.00	
Insurance—Unexpired		2,404.93	
Deferred Taxes and Licenses		280.41	
Improvements		1,228.45	
Charges Against Prior Management:			2,272.52
(d) Wood Bros. Holding Company		2,272.52	
TOTAL ASSESTS			$49,002.30

LIABILITIES	**DETAIL**		**AMOUNT**
	$	$	$
Liabilities—Operating			11,400.55
Audited Vouchers		6,191.01	
Accrued Pay Roll		5,209.54	
(e) **Accrued Taxes, Penalty, Interest**			24,010.17
Pro-rata 1931-32 Taxes	17,368.14		
Interest at 7%, 7/1/32 to 7/31/34	4,342.03		
	(b) 21,710.17		
July pro-rata 1934-5 Taxes	2,300.00		
Notes Payable			10,000.00
Credits to Prior Management			4,692.99
Wood Bros. Holding Co.		4,132.28	
Oakland Hotel Company		560.71	
			50,103.71

Receivership Profit:	1932	2,142.18	
" Loss:	1933	[RED] 1,740.70	
" "	1934 (e)	[RED] 1,502.89	[RED] 1,101.41

(a) Includes Assests purchased by Receiver only. Depreciation likewise is on these assests only. Depreciation on prior Hotel Oakland Furniture & Fixtures & Building not included herein.

(b) Total Taxes including the above penalties and interest now standing against the property amount to $74,786.46. The amounts shown as Liabilities of Receivership are accruals applying to unpaid pro-rata only of taxes for period since 1/19/32

(c) An Additional $24,781.33, or a total of $28,613.61 is claimed by Receiver for Wood Bros. Holding Company, $18,-466.90 of which is denied by Henry Barker, Receiver, Hotel Oakland.

(d) An additional $8,984.17 is claimed by Receiver as being a counter claim against (c)

(e) On account of change in State Law, reducing annual penalties on unpaid taxes from 7% interest per annum and 10% penalty each July 1st, to straight 12% annual interest, penalties & Interest to June 30th were reduced from $23,544.87 to $16,891.00 a difference of $6,653.87. Proportion of these penalties & Interest charged on Receivers Books from 1/19/32 to 6/30/34 was reduced from $5,921.50 to $4,168.35, making a gain for Receivership, which has been set up to 1934, of $1,753.15

TOTAL LIABILITIES	$49,002.30

HOTEL OAKLAND — ADVANCE REPORT — AUGUST 1934

OPERATING INCOME	August 1934	Total To Date	August 1933	Total To Date
Rooms and Rentals	11 960 17	$ 93 916 85	10 544 65	87 845 95
Catering	10 480 22	86 465 16	10 254 88	85 551 09
Tavern	5 061 99	40 631 69	3 237 15	24 085 00
Kitchen Service Bar	325 10	2 470 05	285 30	2 830 30
Lobby Liquor Store	173 10	1 682 15	.....	.....
Barber Shop	145 95	1 301 60	160 30	1 279 15
Telephone	961 82	6 178 42	881 56	5 773 43
Tailor	239 35	1 646 30	193 25	1 328 25
Cigars and News	200 00	1 600 00	200 00	1 600 00
General Store Sundry Sales	21 69	158 11	16 84	192 96
Guests Laundry	436 36	2 615 83	267 25	2 182 93
Beauty Salon	100 00	800 00	100 00	800 00
Hat Checking	37 37	403 87	50 00	400 00
Pay Toilet	7 20	57 80	13 70	100 82
Discount	53 39	621 12	97 37	883 53
Sundries	97 70	437 55	27 66	520 13
	$30 301 41	$240 986 50	$26 329 91	$215 373 54
OPERATING EXPENSES (before distribution)				
Pay Roll	11 700 82	93 380 48	11 249 73	88 959 96
Food Issues	6 411 36	50 745 32	5 788 11	46 533 19
Beverage Issues	1 890 92	18 676 46	1 247 47	9 891 05
House Supply Issues	797 35	6 967 48	671 53	5 664 52
Engineer Bills	395 55	2 218 40	328 27	1 841 49
Ice Plant	.....	79 97	.....	46 83
Fuel Oil & Natural Gas	720 19	5 456 89	612 35	5 026 40
Light	598 24	5 070 26	590 66	4 901 04

Power	278 05	2 719 71	358 57	2 801 11
Water	469 22	3 770 10	425 14	3 387 20
Advertising Bills	807 34	6 380 53	1 067 91	6 259 96
Music	409 48	4 557 62	624 55	4 231 91
Guests' Laundry	324 52	2 087 23	177 53	1 884 31
Bad Debts	100 00	800 00	100 00	950 00
Sales Tax	66 89	551 28	27 44	27 44
Taxes on Checks, Light & Licenses	37 64	328 03	59 32	458 33
Telephone	1 009 12	6 110 10	1 000 75	6 023 51
Sundries (Dues, Ins. Comp. Catering, etc.)	804 08	7 760 83	790 91	6 683 10
	26 820 77	217 660 69	25 120 24	195 571 35
OPERATING PROFIT	3 480 64	23 325 81	1 209 67	19 802 19

[16]

	August 1934	Total To Date	August 1934	Total To Date
X FIXED CHARGES				
Taxes—Real & personal Property	2 300 00	18 898 30	2 400 00	21 289 08
Street Lighting Assessment	17 73	141 87	17 73	193 60
xx Tax Interest	173 68	red 796 19	101 60	812 75
Depreciation—Receivers Asset only--	558 72	4 005 83	405 16	2 821 43
Insurance—General	267 42	2 044 43	250 64	2 001 42
Note Interest	51 67	413 04	51 67	201 34
Tax Penalty	.....	.....	.....	1 741 60
	$3 359 22	24 707 28	3 226 80	29 061 22
NET GAIN OR LOSS:	121 42	1 381 47	2 017 13	9 259 03

X Fixed Charges are those of Receivership only. Does not include Bond Interest, Depreciation on Oakland Hotel Building, Depreciation on Furniture and Equipment and Fixtures.

XX Above Tax Interest is calculated on Receiver's pro-rate of unpaid 1931-2 tax 1/19/32 to 6/30/32, $17,369.14. Total Tax Interest on total unpaid taxes (without penalties) $57,322.24, is now 1% per month, or $573.22.

[17]

EXHIBIT "D"

WHEREAS, it appears that this corporation is in imminent danger of losing all of its properties and having the same sold at a sacrifice under proceedings pursuant to the Deed of Trust of the Bondholders of said Company, by which sale the said corporation would lose all its properties and the bondholders would suffer severe losses; and

WHEREAS, it appears that the Congress of the United States has passed an Amendment to the Bankruptcy Law, known as Section 77B of said Bankruptcy Laws, which Act was approved on June 7, 1934; and

WHEREAS, under said Act this corporation may obtain such relief that it will be restored to the possession of its properties and will be enabled to carry on the hotel business in which it was engaged and effect a plan of reorganization which may save its properties and bring large returns to the stockholders and bondholders of this company,

NOW, THEREFORE, IT IS RESOLVED, that this corporation take immediate proceedings under Section 77B of the Bankruptcy Act of the United States to effect a plan of reorganization, and that W. C. JURGENS, the President of this corporation be, and he hereby is, authorized and directed for

and on behalf of this corporation to verify and file, or have filed, in the proper District Court of the United States, a petition under said Section 77B for such reorganization or other relief under such Act as is provided therein and to take or have such proceedings taken as are necessary or proper under Section 77B, upon such petition and in order to effect such reorganization or to benefit by any of the provisions of said Act and to carry said proceedings through to their ultimate end, and to employ all necessary assistance by legal counsel or otherwise to secure the relief provided for by said Act, and this he shall do forthwith.

I, E. LOWAN, Asst. Secretary of OAKLAND HOTEL COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, do hereby certify that the foregoing is a full, true and correct copy of a resolution of the Board of Directors of said corporation duly passed and adopted at a meeting thereof, duly convened and held, on Monday, the 24th day of September, 1934, [18] at its office at Hotel Oakland, Oakland California, at the hour of 12 o'clock, M., at which meeting a quorum of said Board of Directors of said corporation was present and voted in favor of said resolution, which resolution is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said

corporation this 24th day of September, 1934.

[Seal] E. LOWAN
Asst. Secretary. [19]

EXHIBIT "E"

WHEREAS, THE CHAS. JURGENS CO. has been informed by the President that there was recently enacted by Congress an Amendment to the Act establishing a uniform system of bankruptcy throughout the United States for the relief of corporate debtors, which amendment is known as 77B of the Bankruptcy Act, which amendatory act was approved June 7, 1934; and

WHEREAS, The Chas. Jurgens Co. owns and controls OAKLAND HOTEL COMPANY; and

WHEREAS, it appears that by taking advantage of this Act Oakland Hotel Company will have an opportunity to restore itself in the hotel business and will have an opportunity to place itself upon a paying basis; and

WHEREAS, it appears that unless relief is obtained through this amendatory act, Oakland Hotel Company will lose all its holdings within the near future and its properties will be sacrificed at a price which will wipe out entirely the investment of The Chas.

Jurgens Co., and cause a severe loss to the bondholders of Oakland Hotel Company,

NOW, THEREFORE, IT IS HEREBY RESOLVED that it is the concensus of opinion of this meeting of stockholders of The Chas. Jurgens Co. that steps should be taken immediately by OAKLAND HOTEL COMPANY to take advantage of said amendatory act and secure the relief provided thereunder; and

IT IS THEREFORE RESOLVED, that the President of this company is hereby authorized and directed to secure action to that end by the Board of Directors of Oakland Hotel Company at any meeting which has been called or which may be called by that body, and the president is hereby directed to see that the resolution is passed by said body taking advantage by the corporation, Oakland Hotel Company, of said amendatory act of said Congress, being Section 77B of "An Act to establish a uniform system of bankruptcy throughout the United States, approved June 7, 1934", and that said action be taken forthwith.

I, E. LOWAN, Asst. Secretary of THE CHAS. JURGENS CO., a corporation duly organized and existing under and by virtue of the laws of the State of California, do hereby [20] certify that the foregoing is a full, true

and correct copy of a resolution duly passed and adopted at a meeting of the stockholders of THE CHAS. JURGENS CO., held on Monday, the 24th day of September, 1934, at 10:30 o'clock, A. M., at the office of the company, 1224 Broadway, Oakland, California, at which meeting a majority of the stock was represented and voted in favor of said resolution, which resolution is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said corporation this 24th day of September 1934.

[Seal] E. LOWAN

[Endorsed] Filed Oct 18, 1934 10:47 AM
WALTER B. MALING, Clerk [21]

[Title of Court and Cause.]

ORDER APPROVING PETITION UNDER SECTION 77B, BANKRUPTCY ACT.

Upon reading and filing the petition of OAKLAND HOTEL COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California to be allowed to obtain the relief allowed by Section 77B of the Bankruptcy Act, and due consideration having been given thereto, and being satisfied that said Petition complies with Section 77B of the Bankruptcy Act, as herein set forth, and has been filed in good faith,

IT IS HEREBY ORDERED that said Petition

is hereby approved as properly filed under Section 77B of An Act of July 1, 1898, entitled: "An Act to establish a uniform system of bankruptcy throughout the Untied States", which section went into effect June 7, 1934.

Dated: San Francisco, California, October 20th, 1934.

FRANK H. KERRIGAN
Judge.

[Endorsed] Filed Oct 20, 1934 12:51 PM
WALTER B. MALING, Clerk. [22]

[Title of Court and Cause.]

ORDER APPROVING PETITION UNDER SECTION 77B, BANKRUPTCY ACT, AND APPOINTING TEMPORARY TRUSTEE.

Upon reading and filing the petition of OAKLAND HOTEL COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California to be allowed to obtain the relief allowed by Section 77B of the Bankruptcy Act, and due consideration having been given thereto, and being satisfied that said petition complies with Section 77B of the Bankruptcy Act, as herein set forth, and has been filed in good faith,

IT IS HEREBY ORDERED that said Petition is hereby approved as properly filed under Section 77B of an Act of July 1, 1898, entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", which section went into effect June 7, 1934;

And it appearing to the Court that Henry Barker is now in possession of all of the property of the debtor, including the Oakland Hotel and all of its equipment and appurtenances, and is now operating and administering same, pursuant to his appointment as receiver in the action entitled, First Federal Trust Company v. Oakland Hotel Company, No. 122,289, in The Superior Court of the State of California, in and for the County of Alameda, and that said Henry Barker should be continued in possession temporarily as Temporary Trustee;

It is hereby further ordered that said Henry Barker be and he is h e r e b y appointed Temporary Trustee of the debtor's [23] estate, that the amount of the bond to be given by said trustee be and the same is hereby fixed at Ten Thousand Dollars ($10,000.00), that upon filing such bond said trustee shall have all the title and shall exercise, subject to the control of this court and consistently with the provisions of said Section 77B, all powers of a trustee appointed pursuant to Section 44 of said Act, and, subject to such control, the power to operate the business of the debtor, including the operation of said Oakland Hotel, until the further order of this court;

It is hereby further ordered that said bond be filed within five (5) days from the date of this order, and that, upon the filing of said bond, the said Henry Barker as such receiver shall vacate and deliver possession of said property to said Henry Barker as such trustee;

It is hereby further ordered that said action No. 122,289 be and the same is hereby stayed and the said Superior Court and all of its Receivers, Trustees or Officers restrained from proceeding any further in said action until the further order of this court, subject however to the power of said Superior Court to take any appropriate action in reference to the settlement of any account of its said receiver, in reference to terminating said receivership and in reference to fixing, subject to the further order of this court, the reasonable administrative expenses and allowances in said proceeding now pending in said Superior Court;

It is further ordered that all pending suits against the debtor are hereby stayed until the further order of this court, and the commencement or continuation of any suits against the debtor are hereby enjoined until the further order of this court, and the enforcement or foreclosure of any liens upon the estate of the debtor are hereby stayed [24] until the further order of this court; and

It is further ordered that any proceeding for the sale of the properties of said debtor under any trust indenture, deposit agreement or other authorization, is hereby stayed;

It is further ordered that the said trustee shall give notice to the Creditors and stockholders of Oakland Hotel Company of a hearing to be held within thirty (*3*) days after the date of this order to take place on the 19 day of November, 1934, at the hour of 10 o'clock A. M., or as soon thereafter as the mat-

ter can be heard, in the court room of this court, at which hearing, or an adjournment thereof, or at any subsequent hearing after notice, this court may make an order making permanent such appointment of said trustee, or terminating it and restoring the debtor to possession or appointing a substitute trustee or trustees or appointing an additional trustee or trustees, at which time the debtor, creditors and stockholders shall have the right to be heard upon such questions as come before the court; said notice shall be given by publication thereof to be made at least once a week for two successive weeks before said hearing, and a copy of said notice shall be mailed, postage prepaid, by depositing the same in the nearest United States Post Office and addressed to the creditors and stockholders of said company at their last known place of address, said deposit to be made at least two weeks before said hearing;

It is further ordered that the trustee shall prepare a list of all known bondholders or creditors of, or claimants against the company, the character of their debts, claims and securities and the last known Post Office address or place of business of each creditor or claimant, and

A list of the stockholders of each class of the debtors and the last known Post Office address or place of business of each, which lists shall be open for the inspection of any [25] creditor or stockholder of the debtor during reasonable business hours upon application to the trustee during the

time the trustee is in possession of such properties and for the use of this court at the hearing to take place on the 19 day of November, 1934, at the hour of 10 o'clock A. M. or as soon thereafter as the matter can be heard in the court room of this court.

Dated: San Francisco, California,
October 23rd, 1934.

FRANK H. KERRIGAN

[Endorsed] Filed Oct 23, 1934 9:59 A. M.
WALTER B. MALING, Clerk. [26]

[Title of Court and Cause.]

ORDER AUTHORIZING TEMPORARY TRUSTEE TO EMPLOY ATTORNEY

Upon reading and filing the verified petition of Henry Barker, temporary trustee in the above entitled proceeding, for an order authorizing said temporary trustee to employ Charles A. Beardsley as attorney for said temporary trustee, and due consideration having been given thereto, and the court being satisfied that said attorney represents no interest adverse to said temporary trustee, or adverse to any creditor in the matters upon which he is engaged, and his employment would be for the best interests of the estate, and that the cause is one justifying a general retainer,

It is hereby ordered that said temporary trustee be and he is hereby authorized to employ said Charles A. Beardsley as his attorney herein under a general retainer.

Dated San Francisco, California, October 24, 1934.

FRANK H. KERRIGAN
Judge.

[Endorsed] Filed Oct 24, 1934 12:25 P. M.
WALTER B. MALING, Clerk. [27]

[Title of Court and Cause.]

OBJECTIONS TO ORDER APPOINTING TEMPORARY TRUSTEE AND SUPPLEMENTAL ORDERS.

The Petitioner, debtor, not having sufficient time to present his objections to the appointment of Henry Barker as temporary trustee and ask to have itself restored to possession when the matter came before this court on Saturday, October 20th, now presents these objections so they may appear in the record and asks for a further hearing.

OBJECTIONS:

I.

That no sufficient hearing was had upon the merits as to temporarily restoring the debtor to possession or appointing a trustee for the reason that the matter came before the court just before the Judge was compelled to leave for a meeting of the judges. This was through no fault of the court for the court indicated that it would be willing to listen to the matter later in the day or on some future date, but upon the suggestion of Mr. Beardsley that

the matter would only take five minutes, he immediately appointed Mr. Barker as trustee, as we remember the circumstances, but in any event, no adequate [28] hearing was had which is contemplated by sub-section C of 77B of the Bankruptcy Act. In fact. under this act, as under the railroad reorganization act, which is section 77, all of which were adopted in 1934, a trustee should not be appointed in these proceedings except for good cause shown;

Lansdown v. *Farris,* 66 Fed. (2d) 939;

for the act is primarily for the benefit of the debtor, and the matter of the appointment of a trustee is secondary thereto.

II.

That under 77B of the Bankruptcy Act, where the estate is in the hands of a receiver of the state courts, it has so far been the custom of the federal courts and seems to be the purpose under subdivision I of 77B, that the property shall be entirely taken out of the hands of the receiver for the state courts and those proceedings immediately stopped and an accounting taken;

In re South Coast Co., Debtor, D. C., Del. No. 1075-1079, in bankruptcy, September 12, 1934, Nealds, J.

The court also has a case which we understand is in point, which we have not had access to. This should be so because the receiver under the state court has an entirely different alignment and affiliation to be satisfactory to the federal court and the

court here not having taken time to examine these affiliations in the case at bar is not apprised of the matter.

III.

The petitioner has very valid objections to the appointment of Henry Barker as temporary trustee, among others, that he was appointed at the suggestion of the Committee for the Bondholders who are only some of the creditors and this committee and [29] Mr. Barker have been seeking to sell this property at a cheap upset price, or at a price which is not for the interests of the debtor or all the creditors.

See: *First National Bank* v. *Flershem,* 290 U. S. 504-525;

This we wish to show. The Act contemplates the appointment of an impartial trustee and he cannot be impartial if he is subject to the orders of or is closely allied to one body of creditors who are not acting for the benefit of all concerned. It could have been shown that restoring the debtor to possession would not disorganize the personnel, but even so, the act contemplates that the organization should be disrupted if it is for the best interests of the debtor and its creditors. The petitioner, then, objects to the temporary trustee upon the ground that he cannot be and is not an impartial trustee.

IV.

If the court retains the receiver of the state court as a trustee under this court, he retains the old organization and its attorneys under receivership,

which was secured by the bondholders who are acting for their own interests and not for the interests of the debtor or the other creditors. This would not be permitted in an ordinary receivership in a federal court and it is not contemplated under Section 77B of the Bankruptcy Act.

See: *First National Bank* v. *Flershem,* supra.

V.

That if permitted, the debtor can show that the allegations of Paragraph X of the petition are true and that Mr. Barker has been attempting himself to sell the property for the bond committee. The exclusive possession of the property is in the hands of this court. A similar act, the [30] Railroad Reorganization Act, has been upheld and its provisions held constitutional. The federal court, therefore, should cut itself off from all proceedings in the state court which were begun for the foreclosure of the trust indenture and Mr. Barker was put into possession as receiver until the sale could be made. This is not the spirit of the bankruptcy act as amended in 1934.

In re Chicago R. I. & P. Co., 72 Fed. (2d) 443;

Lansdown v. *Faris,* 66 Fed. (2d) 939;

Ex Parte Baldwin, 54 Sup. Ct. 551, 78 Law. Ed. Vol. 78, 674;

In re Jacobs, 7 Fed. Supp. 749.

VI.

Finally, under Section 77B of the Bankruptcy

Act no trustee should be appointed over the objection of the debtor. He is the primary person to be protected and the Act does not contemplate that any person should be appointed trustee whom he considers inimical to his interests. Section C provides that the debtor shall have the right to be heard on all questions and that the creditors and stockholders shall have the right to be heard on the question of the permanent appointment of a trustee. On the temporary appointment of the trustee this is a matter between the court and the debtor and the best interests of the estate. It follows that if a debtor objects to a trustee he should not be appointed.

WHEREFORE, the debtor prays this court for a further hearing of this matter at its early convenience.

Dated: October 29, 1934.

Respectfully submitted,

ROBBINS & VAN FLEET.

[Endorsed] Filed Oct 29, 1934 3:47 PM
WALTER B. MALING, Clerk. [31]

[Title of Court and Cause.]

NOTICE OF MOTION

WHEREAS, the petitioner has filed objections to the Orders appointing a temporary trustee and supplemental orders, notice is hereby given to said trustee and his attorneys, Fitzgerald, Abbott & Beardsley, Oakland, California, that petitioner will,

on Monday, the 5th day of November, 1934, at the hour of 10 o'clock, A. M., or as soon thereafter as the matter can be heard, move the above entitled court to set aside its Order as heretofore made in this proceeding and ask the court to grant a further hearing based upon these objections as to whether the debtor shall be restored to possession or an impartial trustee appointed by this court.

This motion is based upon the objections herewith filed and upon all the records in the case.

ROBBINS & VAN FLEET
Attorneys for Petitioner.

[Endorsed] Filed Oct 29, 1934 3:47 PM
WALTER B. MALING, Clerk. [32]

[Title of Court and Cause.]

TEMPORARY TRUSTEE'S STATEMENT OF POINTS AND AUTHORITIES IN REPLY TO OBJECTIONS TO APPOINTMENT OF TEMPORARY TRUSTEE.

Henry Barker, Temporary Trustee in the above entitled proceeding, respectfully presents his statement of points and authorities in answer to the petitioner's objections to the order appoint*ment* the temporary trustee and supplemental orders, as follows:

I.

The order appointing the temporary trustee was made in accordance with the express provisions of the Bankruptcy Act, Section 77B (c) (1).

II.

The allegations of the debtor's petition, showing that Henry Barker was in possession, and had been continuously in possession since January, 1932, conducting the business of the Oakland Hotel as receiver pursuant to an order of the state court, coupled with the objection of the trustee under the bond issue and of the bondholders' committee to the restoration of the debtor to possession, fully justified the order appointing said Henry Barker as temporary trustee; and the hearing preceding said appointment was as full and complete as the facts and circumstances justified.

III.

While Section 77B provides for temporarily continuing the debtor in possession, in the discretion of the court, the Section does not provide for placing in possession temporarily [33] or otherwise a debtor which has been out of possession for several years; and the purpose of the Section would not be served by an order thus temporarily placing the debtor in possession.

IV.

There is no merit in the claim that the fact that Henry Barker was theretofore the receiver appointed by the state court has any tendency whatever to disqualify him from acting as temporary trustee, or in the claim that the objection of the debtor is a bar to the appointment of a temporary trustee.

Section 77B (c) (1).

V.

All of the issues raised by the debtor upon this motion may be tried at the hearing set for November 19, 1934, of which hearing the creditors and Stockholders have notice, and at which hearing they have an opportunity to be heard. Section 77B provides that such issues shall be tried at such a hearing. And there is no showing, and no possibility of any showing, that the interests of any one will be jeopardized or impaired by a continuation for another two weeks of the hotel management that already has continued for nearly three years, all at the request of the principal creditors and without any apparent objection from the debtor (prior to the filing of the debtor's petition on October 18, 1934).

Wherefore, the temporary trustee respectfully prays that the debtor's objections be overruled.

Dated: October 30, 1934.

Respectfully submitted,

CHARLES A. BEARDSLEY,
1516 Central Bank Building,
Oakland, California,
Attorney for Temporary Trustee.

[Endorsed] Filed Oct. 31, 1934 4:01 P. M.
WALTER B. MALING, Clerk. [34]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING NOTICE TO CREDITORS

State of California,
County of Alameda—ss.

Ernest Louvau, being first duly sworn, deposes and says:

That at all times herein mentioned I was, ever since have been, and now am, a citizen of the United States, over the age of twenty one years and not a party to the above proceeding; on November 1, 1934, I mailed a copy of the annexed notice, postage prepaid, by depositing the same in the Post Office in Oakland, California, being the Post Office nearest the place of business of Oakland Hotel Company, addressed to each of the creditors of Oakland Hotel Company at their last known place of address, the names of said creditors and the respective addresses to which said copies of said notice were directed being set forth on the annexed list entitled, "List of All Known Bondholders and Creditors of Oakland Hotel Company."

ERNEST LOUVAU

Subscribed and sworn to before me this 2nd day of November, 1934.

[Seal] CONSTANCE E. MULVANY
Notary Public in and for the County of Alameda, State of California. [35]

NOTICE

IN THE SOUTHERN DIVISION OF the United States District Court, in and for the Northern District of California.

In the Matter of the Application of OAKLAND HOTEL COMPANY under Section 77B of an act of Congress of the United States of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as Amended June 7, 1934".—No. 25428-K.

Oakland Hotel Company having filed its petition praying that it be afforded an opportunity to effect a reorganization under Section 77B of that certain Act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended June 7, 1934, and said petition having been heretofore approved by the above entitled Court as properly filed under said section, and said Court by its order duly made and entered on October 23, 1934, having appointed the undersigned Henry Barker as temporary trustee of the debtor's estate:

Notice is hereby given that MONDAY, November 19, 1934, at the hour of 10 o'clock a. m. of said day, at the courtroom of the above entitled Court, Room 332 of the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, has been fixed by the Court as the time and place for

a hearing to be had in the following matters:

(1) Whether or not the Court shall make permanent such appointment of said trustee or shall terminate such appointment and restore the debtor to possession, or shall appoint a substitute trustee or trustees, or an additional trustee or trustees.

(2) Any and all other matters that may properly come before the Court at said time and place.

All the creditors and stockholders of said debtor and any and all other persons, firms or corporations interested in the above proceedings are hereby notified to appear at said time and place to show cause, if any they have, why such action should not be taken by said Court.

Dated October 30, 1934.

HENRY BARKER.
Temporary Trustee, Oakland Hotel Company.

CHARLES A. BEARDSLEY, 1516 Central Bank Building, Oakland, California, Attorney for Temporary Trustee. Nov. 1-8-1934 (2t)

Published in "The Recorder," 374 Pine Street, San Francisco, California. Phone SUtter 1190.

[36]

LIST OF ALL KNOWN BONDHOLDERS AND CREDITORS OF OAKLAND HOTEL COMPANY

A. Bondholders of bonds secured by Deed of Trust on property of Company.

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
Baker, Thomas S.	Holly, Elmstead Road West Byfleet, Surrey, England	629/633	5,000.00
Bank of Alameda County	Alvarado, California	457/8, 56/8	5,000.00
Bliss, Walter D.	Room 1008, Balboa Building, San Francisco, California	462/463	2,000.00
Booth, Carrie L.	375 Euclid Avenue Oakland, California	249/51	3,000.00
Booth, Elmer Trustee of tr. cr. by par. 11 last will & test. of Nellie S. Prescott	c/o Trust Department, Crocker First National Bank of San Francisco Post & Montgomery Streets San Francisco, California	252/256 Incl. 381	6,000.00
Brockway, Anna	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California	278/9	2,000.00
Brown, Mrs. Stewart	San Anselmo, California	570	1,000.00
Caldwell, Marjorie S.	79 Ledyard Road, R. F. D. 1 Hartford, Connecticut	441	1,000.00
Carey, Julya T.	Box 321, San Anselmo, California	569	1,000.00
Carpenter, Fred	San Anselmo, California	643	1,000.00
Carrigan, Anna Virginia	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	732/3	2,000.00
Carrigan, Camilla O.	246 West Santa Inez Avenue San Mateo, California.	145/7	3,000.00
Carrigan, Camilla O.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	644/5	2,000.00
Central Bank of Oakland Trustee under will of Eliza J. Hyde, Deceased	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	233/4, 402, 404, 445	5,000.00

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
ral Bank of Oak-, Trustee for H. K. son	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	421	1,000.00
ral Bank of Oakland, stee for David Jack-	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	16/18	3,000.00
ral Bank of Oakland. stee for Will of John ones, Deceased	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	615/616	2,000.00
ral Bank of Oakland, stee for Estate of F. Ioffett, Deceased	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	181, 478	2,000.00
ral Bank of Oakland, stee Under Will of J. Iurphy, Deceased	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	115/119	5,000.00
ral Bank of Oakland	Central Bank Building, 14th and Broadway Oakland, California.	48/55, 77/91, 106/112, 125/139, 193/200, 208/222, 265/271, 280/294, 351/358, 366/380, 571/605	148,000.00
rch, Elizabeth G.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	76, 124	2,000.00
oun, Mrs. Julia	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	165/6	2,000.00
se, William	LeDuc Street Grass Valley, California	684,559	2,000.00
lin, T. A.	Central Bank of Oakland 14th and Broadway Oakland, California.	396/400	5,000.00
cker First National k of San Francisco	Post and Montgomery Streets San Francisco, California	13/15, 68/72, 98/7, 176/9, 296/301 310/220, 339, 384, 489/90, 625, 646/7, 736/7, 303/8	46,000.00
hing, Charles S.	c/o Cushing & Cushing 1 Montgomery Street San Francisco, California	257,302	2,000.00

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
Cushing, O. K.	c/o Cushing & Cushing 1 Montgomery Street San Francisco, California.	425	1,000.00
Deane, Cornelia A.	Hotel Shaw, Market, McAllister & Jones Streets San Francisco, California.	390	1,000.00
DeGolyer, Annie C.	217 Federal Telegraph Building, 12th & Washington St. Oakland, California.	46, 45, 180/182 525	5,000.00
Dexter, Ella B.	1603 Santa Clara Avenue Alameda, California.	484/5	2,000.00
Dickerman, Mrs. Margaret H.	Nevada City, California.	452	1,000.00
Dinsmore, Geo. B.	312 California Street San Francisco, California.	9	1,000.00
Dolan, Mrs. M. Elis.	916 Ventura Avenue Berkeley, California.	483	1,000.00
Edwards, B. F.	106 Ross Circle Oakland, California.	74, 159	2,000.00
Faville, Wm. B.	1002 Crocker First National Bank Building, Post & Montgomery Streets San Francisco, California.	206/7, 276/7, 360/2, 464/6, 496/500 112	15,000.00
First National Trust & Savings Bank of Santa Barbara	Santa Barbara, California.	3/4, 6, 405, 439, 739, 740/2 743/4	11,000.00
Fisher, Cora M.	660 Post Street San Francisco, California.	183, 560	2,000.00
Fitzsimmon, Mary	148 Shrader Street, San Francisco, California.	99/100	2,000.00
Flood, Eugene V.	214 Bank of America Building 12th & Broadway Oakland, California.	121, 160, 429/31	5,000.00
Fogerty, Nora T.	609 Sutter Street, San Francisco, California.	639/40, 738, 747, 506	5,000.00
Gardner, Charles	825-38th Street Oakland, California.	422	1,000.00
Garthwaite, Mrs. Mary L.	c/o Trust Department Bank of America, 12th & Broadway Oakland, California.	433/4	2,000.00
GATCH, Claud	Hotel Oakland, 14th & Harrison Street, Oakland, California.	423	1,000.00
Glasson, Bernice C.	W. Main Street, Grass Valley, California.	446/450	5,000.00
Gould, Mrs. Anna L.	702 E. 4th Street, Newton, Iowa.	491	1,000.00

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
ant, George H.	214 Bank of America Building 12th & Broadway Oakland, California.	185/6, 432	3,000.00
enfell, William J.	Grass Valley, California.	606/7	2,000.00
gemann, Edwin E.	Livermore, California.	309	1,000.00
ron, Dudley	c/o Heron & Co. Russ Building, 235 Montgomery Street San Francisco, California.	25	1,000.00
ll, Sallie	2245 Larkin Street San Francisco, California.	482	1,000.00
oper & Company	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	36/39, 32, 142 188/91, 154, 93, 157/8, 385/7, 94, 321, 424, 436/7, 481, 272, 440, 479, 486/8, 30/31, 610/13, 641, 19, 201/5, 161/4, 143, 428, 435, 273/5 41/43, 144, 259/60, 438, 526/7	61,000.00
rner, Lottie B.	35 Greenbank Piedmont, California.	454/5	2,000.00
ntington, Thos. W.	Anacapri, Isle of Capri, Italy	258	1,000.00
tchison, Mrs. Bessie	Nevada City, California.	453	1,000.00
nnston, Wm. E.	Nevada City, California.	322	1,000.00
ughorne, Mrs. Julia	c/o Trust Department, Crocker First National Bank of San Francisco, Post & Montgomery Streets, San Francisco, California.	11/12	2,000.00
ngman, Miss Alice M. d Mrs. Libbie L. ields	Nevada City, California.	44, 495	2,000.00
ngman, Miss Alice M.	Nevada City, California.	456	1,000.00
wis, Azro N.	703 Market Street, San Francisco, California.	550/554	5,000.00
wis, Wilmarth S.	c/o A. N. Lewis, 703 Market Street, San Francisco, California.	391/5	5,000.00
cNaughton, Edith A.	Hotel Shaw, Market, McAllister & Jones Streets San Francisco, California.	388/9	2,000.00
lvey, William	2416 Valdez Street, Oakland, California.	102	1,000.00

[40]

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
Mann, John B. C.	Grass Valley, California.	104	1,000.00
Mason, Charles W.	c/o Trust Department Central Bank of Oakland 14th and Broadway Oakland, California.	122/3	2,000.00
Meyerholtz, Miss Mata	211 Keokuk Street, Petaluma, California.	745	1,000.00
Middleton, Jean P.	c/o H. E. Nowell, 601 Crocker Building, 620 Market Street San Francisco, California.	617/619	3,000.00
Mine Workers Protective League	114 School Street., Grass Valley, California.	555, 648	2,000.00
Moffitt, James K.	41 First Street, San Francisco, California.	734/5	2,000.00
Moffitt, James K.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	63/67, 228/232	10,000.00
Murphy, Margaret	2725 Nichol Street, Oakland, California.	60/2, 113/4	5,000.00
Native Sons & Daughters Cent. Committee on Homeless Children	955 Phelan Building, 760 Market Street, San Francisco, California.	608/9	2,000.00
Nichols, Grace	7 Laurel Street, San Francisco, California.	40, 568	2,000.00
Palache, Mrs. Eliza M.	Box 322, Carmel, California.	22	1,000.00
Palmanteer, Kate M.	669 Oakland Avenue Oakland, California.	363/5 469/77	12,000.00
Peterson, Emily	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	748/9	2,000.00
Phillips, Alfred	Grass Valley, California.	103	1,000.00
Protestant Episcopal Old Ladies Home	2770 Lombard Street, San Francisco, California.	155, 168, 170/3	6,000.00
Province of the Holy Name	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	167, 148/151	5,000.00
Quinlan, Eleanor	798 Post Street, San Francisco, California.	98	1,000.00

Name	Post Office Address or Place of Business	Serial No. of Bond	Amount
chards & Co.	514 Broadway Building, 1419 Broadway, Oakland, California.	614, 624 557	3,000.00
chardson, Mrs. Eva F.	Holly Oaks, Sausalito, California.	106	1,000.00
obinson, Annie J.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	23/4, 28 34/5	5,000.00
nborne, Henry K.	Box 114, Mt. Herman, California.	7/8	2,000.00
anlan, Mary E.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	223/4	2,000.00
hoenfeld, Bella	2500 Steiner Street, San Francisco, California.	59, 120 359, 626	4,000.00
hoenfeld, J.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	140/141	2,000.00
hoenfeld, Selma	2500 Steiner Street, San Francisco, California.	105,225/6 401,426	5,000.00
ıea, Laura H.	c/o Trust Department, Crocker First National Bank of San Francisco Post and Montgomery Streets San Francisco, California.	382/3	2,000.00
ule, E. G.	Hotel Oakland 14th & Harrison Streets Oakland, California.	323/38, 343/5, 530/49, 686/715	69,000.00
uthern, Mrs. Emma	Empire Street, Grass Valley, California.	556, 101	2,000.00
ear, Harry	Nevada City, California.	558	1,000.00
arr, Geo. W.	Grass Valley, California.	26, 27, 29	3,000.00
mpkins, Ethel H.	Box 411, San Anselmo, California.	567	1,000.00
evor, Miss Helen	2436 Oregon Street, Berkeley, California.	156	1,000.00
ente, Mrs. Barbara	Livermore California.	295	1,000.00

Wesson, Grace	1460 Balboa Street, Burlingame, California.	95	1,000.00
West, Charles H.	c/o P. O. Box 151, Sunol, California.	235/6 261/2, 342	5,000.00
			583,000.00

[42]

The total amount of outstanding bonds is $660,000.00. The names and addresses of the holders of the remaining outstanding bonds are unknown to the Temporary Trustee.

B. Creditors holding claims for Supplies, Merchandise and Service, which claims to the extent of approximately 95% thereof are secured by a Deed of Trust executed by The Chas. Jurgens Co.

Name	Post Office Address or Place of Business	Amount
American Dyeing & Cleaning Works	528 Chestnut Street, Oakland, California.	$ 483.17
G. Bonora Company	4th & Franklin Streets, Oakland, California.	1,513.01
Bruzzone Bros., Inc.	407 - 2nd Street Oakland, California.	2,495.87
Colgate-Palmolive-Peet Co.	Station A. Berkeley, California.	325.03
Community Chest of Oakland	816 Bank of America Building 1212 Broadway Oakland, California.	,449.74
Consolidated Oyster Company	123 Van Ness Avenue, South San Francisco, California.	270.00
Fred W. Diehl, Inc.	324 Franklin Street, Oakland, California.	3,914.96
Dodge-Sweeney Company	362 - 4th Street, Oakland, California.	2,059.09
Dohrmann Hotel Supply Company	1018 Clay Street, Oakland, California.	204.72
East Bay Municipal Utility District	512 - 16th Street, Oakland, California.	2,857.17

lectric Motor & Machine Works	217 Broadway, Oakland, California.	392.40
lobe Grain & Milling Co.	1701 Montgomery Street, San Francisco, California.	175.36
ohn Hansen & Sons	4th & Clay Streets, Oakland, California.	1,466.79
he Irvine Company	381 - 5th Avenue, Oakland, California.	349.62
Levy & J. Zentner Co.	3rd & Franklin Streets, Oakland, California.	449.74
os Angeles Soap Company	599 Second Street, San Francisco, California.	134.91
eyer & Lange	434 Greenwich Street, New York, N. Y.	367.03

[43]

Name	Post Office Address or Place of Business	Amount
lio Match Sales Company	Wadworth, Ohio.	$ 114.07
lvin M. Orr	364 - 2nd Street, Oakland, California.	585.24
is Elevator Co.	23 Stockton Street, San Francisco, California.	105.33
acific Gas & Electric Co.	17th & Clay Streets, Oakland, California.	4,070.35
acific Telephone & Telegraph Co.	1521 Franklin Street, Oakland, California.	1,974.33
Paladini, Inc.	520 Washington Street, Oakland, California.	2,919.03
hoenix Plating Works	461 Bush Street, San Francisco, California.	252.45
oneer Beverages, Ltd.	343 - 10th Street, Oakland, California.	918.17
F. Rathjens & Sons	1331 Pacific Street, San Francisco, California.	133.90
F. Schlesinger & Sons	15th & San Pablo, Oakland, California.	2,556.93
Seulberger & Company	418 - 14th Street, Oakland, California.	137.35
erry Flour Co.	8th Ave., & E. 10th Street, Oakland, California.	142.10

Standard Oil Co. of California	Tapscott Building, 1916 Broadway Oakland, California.	2,928.58
Troy Laundry Co.	1812 Dwight Way, Berkeley, California.	926.15
Central National Bank of Oakland, Joseph H. Grut, Receiver	Central Bank Building, 14th & Broadway, Oakland, California.	19,112.34
West Coast Soap Co.	26th & Poplar Streets, Oakland, California.	266.23
Western Paper Box Co.	5th & Adeline Streets, Oakland, California.	101.60
First National Bank (Anglo California Trust Co.)	1560 Broadway, Oakland, California.	5,333.53
Zellerbach Paper Company	609 Franklin Street, Oakland, California.	205.46
		$61,182.76

[44]

C. Creditor Having claim for Money Loaned, 100% of which claim is secured by the foregoing Deed of Trust executed by The Chas. Jurgens Co.

Name	Post Office Address or Place of Business	Amount
Joseph H. Grut, Receiver Central National Bank of Oakland	Central Bank Building, 14th & Broadway, Oakland, California.	$ 95,169.48

D. Creditors having unsecured claims for money loaned or advanced.

Name	Post Office Address or Place of Business	Amount
W. C. Jurgens	Hotel Oakland, 14th & Harrison Streets, Oakland, California.	$ 7,200.00
The Chas. Jurgens Co.	1224 Broadway, Oakland, California.	147,500.00

Claim on account of partial payment of indebtedness of the Company as result of Sale of Property covered by foregoing Deed of Trust.

Name	Post Office Address or Place of Business	Amount
e Chas. Jurgens Co.	1224 Broadway, Oakland, California.	$10,183.77

Contingent Claim by reason of Guarantee of Obligations of proportion of the foregoing obligations.

Name	Post Office Address or Place of Business	Amount
e Chas. Jurgens Co.	1224 Broadway, Oakland, California.	$151,100.45

terest claimed by the foregoing claimants is not included in e foregoing statement of amounts, either as applied to bond-olders or other secured creditors or unsecured creditors.

HENRY BARKER
Temporary Trustee.

ILED—November 5, 1934-9:38 AM [45]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING NOTICE TO STOCKHOLDERS

State of California,
County of Alameda—ss.

Ernest Louvau, being first duly sworn, deposes and says:

That at all times herein mentioned I was, ever since have been, and now am, a citizen of the United States, over the age of twenty-one years and not a party to the above proceeding; on November 1, 1934, I mailed a copy of the annexed notice, postage prepaid, by depositing the same in the Post Office in Oakland, California, being the Post Office nearest the place of business of Oakland Hotel Company, addressed to each of the stockholders of Oakland Hotel Company at their last known place of address, the names of said stockholders and the respective addresses to which said copies of said notice were directed being set forth on the annexed list entitled, "List of Stockholders of Oakland Hotel Company".

ERNEST LOUVAU

Subscribed and sworn to before me this 2nd day of November, 1934.

[Seal] CONSTANCE E. MULVANY
Notary Public in and for the County of Alameda, State of California. [46]

NOTICE

IN THE SOUTHERN DIVISION OF the United States District Court, in and for the Northern District of California.

In the Matter of the Application of OAKLAND HOTEL COMPANY under Section 77B of an act of Congress of the United States of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as Amended June 7, 1934".—No. 25428-K.

Oakland Hotel Company having filed its petition praying that it be afforded an opportunity to effect a reorganization under Section 77B of that certain Act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended June 7, 1934, and said petition having been heretofore approved by the above entitled Court as properly filed under said section, and said Court by its order duly made and entered on October 23, 1934, having appointed the undersigned Henry Barker as temporary trustee of the debtor's estate:

Notice is hereby given that MONDAY, November 19, 1934, at the hour of 10 o'clock a. m. of said day, at the courtroom of the above entitled Court, Room 332 of the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, has been fixed by the Court as the time and place for a hearing to be had in the following matters:

(1) Whether or not the Court shall make permanent such appointment of said trustee or shall terminate such appointment and restore the debtor to possession, or shall appoint a substitute trustee or trustees, or an additional trustee or trustees.

(2) Any and all other matters that may properly come before the Court at said time and place.

All the creditors and stockholders of said debtor and any and all other persons, firms or corporations interested in the above proceedings are hereby notified to appear at said time and place to show cause, if any they have, why such action should not be taken by said Court.

Dated October 30, 1934.

HENRY BARKER.

Temporary Trustee, Oakland Hotel Company.

CHARLES A. BEARDSLEY, 1516 Central Bank Building, Oakland, California, Attorney for Temporary Trustee. Nov. 1-8-1934 (2t)

Published in "The Recorder," 374 Pine Street, San Francisco, California. Phone SUtter 1190.

[47]

LIST OF STOCKHOLDERS OF OAKLAND HOTEL COMPANY

Name	Post Office Address or Place of Business	Number of shares Preferred Stock	No. of shares Common Stock
sdon, Carolyn S.	55 Alvarado Road, Berkeley, California.	5	
owell, H. C. (Estate)	14th and Clay Streets, Oakland, California.	1	
roll, Paul T.	764 Market Street, San Francisco, California.	5	10
der, T. W. Inc.	Box 384, Oakland, California.	125	
gie, W. E., Dec.	c/o M. C. Chapman and J. F. Conners, Executors, 1212 Broadway, Oakland, California.	10	20
ston, Mary C.	1050 Green Street, San Francisco, California.	10	
leston, J. Y.	364 - 34th Street, Oakland, California.		2
zgerald, R. M.	Central Bank Building, 14th and Broadway, Oakland, California.	25	
den West Brewing Co.	5th and Kirkham Streets, Oakland, California.	10	
eseman, C. J.	Plaza Building, 15th and Washington Streets, Oakland, California.	28	56
gens, Chas. (Estate)	1224 Broadway, Oakland, California.	1	
gens, C. H.	1224 Broadway, Oakland, California.	1	
gens, W. C.	Hotel Oakland, Oakland, California.	1	
gens, Co. The Chas.	1224 Broadway, Oakland, California.	8279	388
owland, J. R.	Tribune Publishing Company, 13th and Franklin Streets, Oakland, California.	5	
wis, Wm. Frisbie Co.	Henshaw Building, 14th and Broadway, Oakland, California.	10	
rris, H. C.	805 Realty Syndicate Building 1440 Broadway, Oakland, California.	10	
rdee, Dr. Geo. C.	672 - 11th Street, Oakland, California.	10	
yder, A. J. (Estate)	c/o J. J. Warner, Administrator, 430 California Street, San Francisco, California.	1	

LIST OF STOCKHOLDERS OF OAKLAND HOTEL COMPANY

Name	Post Office Address or Place of Business	Number of shares Preferred Stock	No. of shares Common Stock
Steel, Mrs. Bertha J.	838 Mendocino Avenue, Berkeley, California.	20	10
Tasheira, A. G.	Bank of America Building, 12th and Broadway, Oakland, California.	5	
Taylor, Jas. P.	Easton Building, 13th and Broadway, Oakland, California.	5	
Whitaker, Emmet K. and Smith, Albert J.	Room 2040, 111 Sutter Street San Francisco, California.	50	
Williams, Harry G.	20th and Franklin Streets Oakland, California.	27	
		8644	486

HENRY BARKER
Temporary Trustee.

[ENDORSED] FILED NOV. 5, 1934, 9:38 A.M.
WALTER B. MALING, Clerk.

[49]

[Title of Court and Cause.]

CREDITOR'S OPPOSITION TO DEBTOR'S REQUEST FOR ORDER PLACING DEBTOR IN POSSESSION.

Crocker First National Bank of San Francisco, Central Bank of Oakland, Edmond G. Soule, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt and William B. Faville, the first named being the trustee under the indenture securing the outstanding bonds referred to in paragraph VII of the debtor's petition, and all of said corporations and persons being the owners of bonds in the aggregate of the face value of $387,000, being more than 58% of the bonds of the face value of $660,000 now outstanding, herein referred to as creditors, respectfully oppose the making of any order herein placing the debtor in possession, or restoring the debtor to possession, or appointing any substitute or additional trustee or trustees, or terminating the trusteeship of Henry Barker, said opposition of said creditors being made and presented upon the following grounds:

1. Said Henry Barker has been conducting the business of Oakland Hotel continuously since January 19, 1932, and it is for the best interest of all parties concerned that the conduct of said business be continuous and uninterrupted;

2. Said Henry Barker is able to conduct said business, and the debtor is unable to conduct said business, in such a manner as to be for the best

interest of all parties concerned;

3. An Answer has been filed, or is being filed, by said [50] creditors controverting the facts alleged in the debtor's petition and seeking a dismissal of said petition, which dismissal would result in said Henry Barker being restored to possession as receiver pursuant to his appointment by the state court, and it is for the best interest of all parties concerned that said Henry Barker as trustee be continued in possession at least until it is determined whether or not he should thus be restored to possession as such receiver;

4. It is for the best interest of all parties concerned that a date be fixed for the trial of the issues raised by said answer to said petition, and that the hearing set and noticed for November 19, 1934, be adjourned, as provided in Section 77B (c) (1) of the Bankruptcy Act, to the date of said hearing on said issues raised by said answer, and that the temporary trusteeship of Henry Barker be thus permitted to continue until said hearing and until a determination of said issues;

5. If said temporary trusteeship is not continued until a final termination of the proceedings herein, it is for the best interest of all parties concerned that an order be made, either at the hearing on November 19, 1934, or at an adjournment thereof making permanent the appointment heretofore made of Henry Barker as trustee.

Said opposition will be based upon the affidavit of James A. Wainwright, attached hereto, upon

said answer to said petition, and upon all of the pleadings and files herein, and upon such oral and documentary evidence as may be presented at the hearing thereof.

Dated November 15th, 1934.

Respectfully submitted,

Chickering & Gregory,
Merchants Exchange Bldg.,
San Francisco, California.
Fitzgerald, Abbott & Beardsley,
Central Bank Bldg.,
Oakland, California.
Attorneys for said Creditors. [51]

[Title of Court and Cause.]

AFFIDAVIT OF JAMES A. WAINWRIGHT

State of California,
County of Alameda—ss.

James A. Wainwright, being first duly sworn, deposes and says:

1. Affiant is a vice president of Central Bank of Oakland which bank is the legal and beneficial owner of bonds issued by the debtor of the face value of $148,000 and the legal owner as trustee of additional bonds of the face value of $18,000, being a total of $166,000 out of the total of $660,000 bonds of the debtor outstanding; at all times since the formation of the Depositors' Committee referred to in paragraph VII of the debtor's petition, af-

fiant has been and now is a member of said committee and the chairman thereof; bonds of the face value of $583,000 out of a total of $660,000 are deposited pursuant to the depositors' agreement creating said committee; Crocker First National Bank of San Francisco is the trustee under the indenture referred to in said paragraph VII; Crocker First National Bank of San Francisco Central Bank of Oakland, Edmond G. Soule, Kate M. Palmanteer, Thomas A. Crellin, James J. Moffitt and William B. Faville are the owners of bonds of the face value of $387,000 out of the $660,000 of bonds outstanding; none of the interest accruing on said bonds since December 31, 1930, has been paid; at all times since the [52] appointment of Henry Barker as receiver in January, 1932, affiant has been familiar with said Barker's operation of Oakland Hotel; in the opinion of affiant, it is for the best interest of all parties concerned that the debtor should not be put in possession of said Oakland Hotel and that Henry Barker should be permitted to continue the operation thereof, said opinion of affiant being based upon the facts hereinafter set forth;

2. Early in July, 1931, Oakland Hotel Company, the debtor herein, served written notice upon the guests of Oakland Hotel to vacate, gave public notice that it was closing Oakland Hotel, and virtually abandoned the operation of the business of said hotel; thereupon Oakland Chamber of Commerce collected from the public the funds neces-

sary to keep said hotel open temporarily pending a consideration of ways and means of securing the continued operation of said hotel, thereby preventing the total discontinuance and consequent destruction of said business proposed by the debtor;

3. Early in August, 1931, largely as a result of the efforts of Oakland Chamber of Commerce, the debtor entered into a lease of said hotel with Wood Brothers Holding Co., whereupon said lessee began the operation of said hotel and continued the said operation until January, 1932; during the period of approximately five months during which said lessee operated said hotel, the operation thereof was distinctly unsuccessful; the business was not operated in a prudent manner or in such a manner as to protect the value of the said hotel or of the business conducted therein; because of the manner in which said business was conducted by said lessee, it soon became apparent that its operation of said hotel could not continue; on or about January 22, 1932, creditors of the lessee filed a petition in bankruptcy against the lessee; the lessee was adjudicated an involuntary bankrupt and the proceedings therein are still pending in this court; on [53] January 18, 1932, said lessee discontinued the operation of said hotel and caused the guests of said hotel to be served with notice of the immediate closing of said hotel;

4. It was after the business of said hotel had been virtually abandoned by the debtor, and after the said lessee had thus made a failure of the

operation of said business, and after the lessee had discontinued said business, that the trustee under the bond issue, at the request of bond holders, instituted the proceedings that resulted on January 19, 1932, in the appointment of Henry Barker as receiver;

5. Henry Barker has had a long and successful experience as a hotel manager; and, at all times since his appointment as receiver in January, 1932, his management of the business of said hotel has been successful and beneficial to the bondholders and to other creditors of the debtor, and to the debtor; under the management of said Henry Barker, and as a direct result of said management, the business of said hotel has very materially improved as compared with the condition of said business when the same was operated by said lessee and also when the same was operated by the debtor immediately before the operation by said lessee;

6. The superiority of the Barker management over the debtor's management is clearly indicated by a comparison of their respective showings as to operating profit and loss; figures are available for such comparison of the debtor management, during the period of two years and four months from January 1, 1929, to April 30, 1931 (two months before the debtor's abandonment of the business), and of the Barker management, during the period of two years and eight months from the beginning of the Barker management to September 30, 1934; the figures used in this comparison were

all prepared by the same auditor and upon the same basis, using in each instance operating income and operating [54] expense and disregarding fixed expense that is the same regardless of the current management;

7. Thus the debtor's management for the two year and four month period shows an operating profit and loss as follows:

	Operating Profit	Operating Loss
January 1 to December 31, 1929	$ 17,039.01	
January 1 to December 31, 1930		$ 8,601.69
January 1, 1931 to April 30, 1931		12,728.91
January 1, 1929 to April 30, 1931		4,291.59

8. In contrast with the foregoing showing made by the debtor's management, the Barker receiver management made the following showing as to operating profit and loss:

	Operating Profit
January 19 to December 31, 1932	$ 43,609.68
January 1 to December 31, 1933	39,975.38
January 1 to September 30, 1934	28,200.52
January 19, 1932 to September 30, 1934	111,785.58

9. The debtor's operating loss of $4,291.59 for the two year and four months period, as compared with the receiver's operating profit of $111,785.58 for the two year and eight and one-half month period, shows that, on the basis of operating profit and loss, the receiver's management was better than that of the debtor to the extent of $116,077.17;

10. The superiority of the Barker management is further indicated by a comparison of the figures for these two periods showing the percentage of gross income used by the respective managements

in operating expense; the debtor used up in operating expense the following percentages of its gross income;

January 1 to December 31, 1929.....	97.15%
January 1 to December 31, 1930.....	101.59%
January 1 to April 30, 1931.....	108.31%
Average for 2 years and 4 months.....	102.35%

[55] in contrast with this showing by the debtor, the receiver's corresponding percentages of operating expense to operating income were as follows:

January 19, to December 31, 1932.....	87.90%
January 1 to December 31, 1933.....	89.80%
January 1 to September 30, 1934.....	90.40%
Average for 2 years and 8 months.....	89.35%

11. During the operation of said hotel by Henry Barker said Henry Barker has paid all current taxes beginning with the first installment of taxes delinquent in December, 1932; on the other hand, during the operation of Oakland Hotel by the debtor the second installment of taxes for the year 1930-1931 were allowed to go delinquent, also the first installment of taxes for the year 1931-32;

12. When the debtor abandoned the operation of said hotel in July, 1931, the debtor left unpaid the current bills owing tradesmen of over $60,000; but during the time that said hotel has been operated by Henry Barker all current bills have been promptly paid when due and discounted, thereby maintaining a good credit standing with merchants and other trades people;

13. During the period during which said hotel has been operated by Henry Barker, capital improvements have been made in said hotel and expenditures made therefor aggegating more than $31,000.00;

14. During the operation of said hotel by Henry Barker as receiver, he borrowed the sum of $10,000.00, which sum was used in the payment of taxes; all of said indebtedness, however, has now been retired by said receiver and all sums expended by him in the operation of said hotel, including the payment of taxes and including said capital improvements, have been paid out of the earnings of said hotel during his operation thereof; as of October 20, 1934, the current liquid assets in the hands of said [56] receiver, consisting of money in bank, cash on hand, good accounts receivable and food and similar hotel supplies amounted to the sum of $25,976.62 as against which there were current liabilities consisting of pay roll, supply bills, etc., of $12,200.00, indicating a liquid position of more than two to one;

15. During the time that said Henry Barker has operated Oakland Hotel, the hotel plant, including not only the building but also the hotel equipment, has been maintained in a condition that is substantially improved over the condition of said plant at the time of the appointment of said Henry Barker as receiver.

16. In considering the relative merits of the debtor's management and the receiver's manage-

ment, it may be noted that the entire period of the receiver's management falls within the years of the present generally recognized depression, while the two years and four month period of the debtor's management, with which the receiver's management is compared in this affidavit, includes the year of 1929, all or substantially all of which year preceded such depression.

JAMES A. WAINWRIGHT

Subscribed and sworn to before me this 13th day of November, 1934

[Seal] CONSTANCE E. MULVANY

Notary Public in and for the County of Alameda, State of California.

[Endorsed] Due Service and receipt of a copy of the within is hereby admitted this 15th day of November, 1934.

ROBBINS & VAN FLEET

Attorney for Debtor.

Filed Nov. 15, 1934 4:05 PM

WALTER B. MALING, Clerk [57]

[Title of Court and Cause.]

CREDITORS' ANSWER TO DEBTOR'S PETITION

At San Francisco, in said district, on the 15th day of November, A. D. 1934.

And now Crocker First National Bank of San Francisco, Central Bank of Oakland, Edmond G.

Soule, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt and William B. Faville, creditors of said debtor, appear, and answer the petition filed by the debtor on October 18, 1934, as follows:

I.

Crocker First National Bank of San Francisco is a national banking association; Central Bank of Oakland is a corporation organized under the laws of the State of California.

II.

Crocker First National Bank of San Francisco is the trustee under the indenture referred to in paragraph VII of the debtor's petition, under which indenture there are outstanding bonds issued by the debtor of the face value of $660,000.00.

III.

Said answering creditors are the owners and holders of bonds issued under said indenture of the face value as follows: [58]

Crocker First National Bank of San Francisco	$ 52,000.00
Crocker First National Bank of San Francisco as trustee under various trusts	56,000.00
Central Bank of Oakland	148,000.00
Central Bank of Oakland, as trustee under various trusts	18,000.00
Edmond G. Soule	69,000.00
Kate M. Palmanteer	12,000.00

Thomas A. Crellin	5,000.00
James K. Moffitt	12,000.00
William B. Faville	15,000.00

The bonds thus owned by said creditors are of the face value of $387,000.00, being more than 58% of said bonds outstanding.

IV.

Said creditors have provable claims which amount in the aggregate in excess of the securities held by them, namely, the security of said indenture, to more than $1,000.00.

V.

Said creditors deny that either the facts alleged in the debtor's petition or otherwise show the need for relief under said section 77B of said Act; said creditors allege that the facts do not justify the granting of said or any relief to the debtor; and, in connection with and in support of said denial and allegation, said creditors allege and deny as follows:

(a) Said creditors allege that the debtor has not operated Hotel Oakland for several years and that in July, 1931, the debtor discontinued the operation of said hotel, gave public notice that it was discontinuing said operation and notified all of the guests in said hotel to vacate forthwith; said creditors allege that, as a result of money contributed and services rendered by others, the carrying out of the debtor's said plan of closing said

hotel and of destroying the business conducted [59] thereat was postponed until January 18, 1932, on which date said hotel was closed; on said last mentioned date, said hotel and the business conducted thereat was finally and definitely abandoned by the debtor to the creditors of the debtor generally, but more particularly to the trustee and bondholders under said indenture; thereupon the said trustee and bondholders took such action as was necessary to secure the operation of said business and the preservation and protection of the said hotel; at no time since said last mentioned date has the debtor operated said business or preserved or protected said hotel, either directly or indirectly, or participated or aided in said preservation or protection;

(b) Said creditors allege upon their information and belief, and for the reasons set forth in the succeeding subdivisions of this paragraph V of this answer, that no reorganization can be effected which will enable the debtor to resume normal business operations, or to continue normal business operations, or to obtain money from income or otherwise with which to pay its indebtedness either as the same may be adjusted or otherwise, or to preserve the investment of its stockholders, or to save anything of value for its stockholders;

(c) Said creditors allege upon their information and belief that the reasonable market value of all the property belonging to the debtor, being said hotel and the equipment therein, does not exceed

the sum of $600,000.00, and that it is extremely doubtful if within a reasonable time any sale of said property could be made for any sum in excess of $500,000, if in fact any sale could be made within a reasonable time for as large a sum as $500,000.00;

(d) All of said property is subject to various secured claims and liens, all of which are prior to the claims of [60] stockholders of the debtor as follows:

Delinquent taxes and penalties to November 1, 1934	$ 76,506.13
Current taxes	26,920.55
Principal of outstanding bonds	660,000.00
Interest on outstanding bonds (January, 1931, to December 31, 1934)	158,400.00
Total secured claims	$921,826.68

(e) In addition to said claims that are secured by the property of the debtor, there are additional claims against the debtor, and additional debts owing by the debtor, part of which is secured by security provided by The Chas. Jurgens Co. and the remainder of which is unsecured, which additional claims and debts, exclusive of interest, as set forth in the list of creditors prepared by the temporary trustee and filed herein, aggregate $321,236.01, making a total indebtedness which is prior to the interest of the stockholders of the debtor, which total indebtedness (exclusive of interest on said sum of $321,236.01) equals $1,243,-032.69;

(f) The debtor's conduct of the business of said hotel during the period of two years and longer immediately preceding its said discontinuation of said business in July, 1931, clearly established that it was then wholly unable to conduct said business successfully, or without heavy and rapidly increasing losses; financial statements issued by said debtor show losses in said conduct of said business as follows:

For the year ending December 31, 1929	$131,670.11;
For the year ending December 31, 1930	163,628.19;
For the four months ending April 30, 1931	65,677.51;

(g) Said creditors allege upon their information and belief that the debtor's credit was practically, if not wholly, destroyed by the character of its operation of said hotel, by [61] its failure to pay tradesmen and other current creditors, by its allowing taxes on the said hotel property to become and to remain delinquent, by its notifications to its guests to vacate, by its public announcements that it proposed to close said hotel, and by the closing of said hotel on the day preceeding the appointment of the receiver and the taking over by said receiver of the conduct of the business of said hotel; said creditors allege further upon their information and belief that the debtor has no money or other assets which it can use either in the operation of said

hotel or in paying its indebtedness or any part thereof, and that the debtor would be unable to procure such credit from trades people or others as would be necessary if it were to operate said hotel, unless such credit were to be secured as a result of an assurance that those extending such credit would be entitled to a claim against the assets of the debtor superior to the claim of the bondholders holding bonds issued pursuant to said indenture;

(h) Said creditors allege upon their information and belief that said debtor is unable to conduct the business of said hotel any more successfully than it conducted said business during the two and one-half years immediately preceding its said discontinuance of said business, if in fact it is able to conduct said business even as successfully as it then conducted said business, or to conduct said business without suffering additional losses similar to those suffered during said two and one-half year period;

(i) Said creditors allege upon their information and belief that the serious illness of W. C. Jurgens referred to in paragraph VI of the debtor's petition did not occur until after the debtor had so discontinued the operation of said hotel, and the said illness was in no way responsible for the debtor's [62] inability to operate said hotel successfully or without suffering said heavy losses;

(j) Said creditors deny that the asset value of the hotel property of the debtor has been greatly

or otherwise enhanced during the management of W. C. Jurgens; and in this connection said creditors allege upon their information and belief that said value greatly depreciated during said management;

(k) Said creditors deny that the land upon which said hotel is situated is assessed for $260,550.00, or for any sum in excess of $179,550.00 or that said land should be conservatively or otherwise estimated to be worth $750,000.00 or anywhere near said sum, or that the hotel building should be valued at anywhere near its original cost, or that said land and building, together with all equipment therein, should be valued at more than $600,000.00; said creditors deny that the debtor has kept said hotel in excellent condition, or that the debtor operated said hotel in a businesslike or economic fashion, or that it bid fair to make an adequate return or any return upon the investment therein; said creditors deny that the losses referred to in paragraph VIII of the debtor's petition came when the recognized depression came, or were related thereto, or that said losses were not caused through fault of the management of said hotel; said creditors deny for want of information and belief that any of the money advanced to the debtor by The Chas. Jurgens Co. was expended in enhancing the value of the hotel property;

(l) Said creditors deny that the receiver has operated said hotel as a second or third rate hotel; and, in connection with said denial, said creditors

allege that the receiver has operated said hotel in a first class manner, and in such a way as to attract and retain patronage and to preserve [63] and protect the value of said hotel and of the business conducted thereat, and far more profitably than said hotel had been or can be operated by the debtor; said creditors deny that $10,000.00 or any other sum was borrowed by the receiver to replace equipment; and, in connection with said denial, said creditors allege that the only sum borrowed by the receiver was $10,000.00 used to pay taxes on said hotel property; all of said sum borrowed has been repaid by the receiver out of his earnings, and the replacements made by the receiver were wholly paid for out of his earnings;

(m) Said creditors deny that it is the intention of the Bond Committee to sell the hotel property at any price less than the full value thereof, or at any price less than the full price obtainable therefor, or to sacrifice said property, or that any sale made by the Bond Committee would disastrously affect real estate values in Oakland;

(n) Said creditors deny that the debtor has any equity in said hotel property or that the value of said hotel property is sufficient to pay the taxes that are a lien thereon and to pay anywhere near the total principal and interest of the outstanding bonds; said creditors deny that any reorganization plan can be worked out that will be as advantageous to the creditors, bondholders and stockholders as the handling of said hotel property in said

receivership and under the jurisdiction of the state court in the proceeding pending therein; said creditors allege upon their information and belief that it is for the best interest of all parties concerned that said property be administered in said receivership proceedings, that neither the debtor, nor the stockholders of the debtor, nor the creditors of the debtor, or any of them, can be in any way benefited by any proceedings had or taken pursuant to the [64] provisions of said section 77B of said Act, and that it is for the best interest of all parties concerned that the debtor's petition be dismissed.

WHEREFORE said creditors pray that said petition be dismissed.

Chickering & Gregory
Fitzgerald, Abbott & Beardsley
Attorneys for said Creditors.

State of California,
County of Alameda—ss.

JAMES A. WAINWRIGHT, being first duly sworn, deposes and says: That he is an officer, to-wit a Vice-president of Central Bank of Oakland, a corporation organized under the laws of the State of California, one of the creditors who present the foregoing answer and that he makes this verification for and on behalf of all of the said creditors; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to those

matters which are therein stated upon his information or belief and that as to those matters he believes it to be true.

JAMES A. WAINWRIGHT

Subscribed and sworn to before me this 13th day of November, 1934.

[Seal] CONSTANCE E. MULVANY,
Notary Public in and for the County of Alameda, State of California.

[Endorsed] Due Service and receipt of a copy of the within is hereby admitted this 15th day of November, 1934.

ROBBINS & VAN FLEET
Attorney for Debtor

Filed Nov 15, 1934 4:05 P. M.
WALTER B. MALING, Clerk. [65]

[Title of Court and Cause.]

ORDER REFERRING SPECIFIED ISSUES TO SPECIAL MASTER

It appearing to the above entitled Court:

That Oakland Hotel Company did, on the 18th day of October, 1934, file in the above entitled matter its application for relief under Section 77B of An Act of Congress of the United States of July 1, 1898, entitled: "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES, AS AMENDED JUNE 7, 1934";

That thereafter, and on the 23rd day of October, 1934, the above entitled Court, after proceedings to that end duly and regularly had and taken, made its order approving said petition as properly filed, appointing Henry Barker as Temporary Trustee of the debtor's estate, setting this day, Monday, November 19, 1934, in the Courtroom of this Court as the time and place for hearing on the question of the permanent possession of debtor's estate, and prescribing the notice to be given of said hearing;

That notice has been given to creditors and stockholders of Oakland Hotel Company of this hearing in the manner and for [66] the time prescribed by said order of October 23, 1934, and said Section 77B of the National Bankruptcy Act;

That on October 29, 1934, said Oakland Hotel Company filed in said matter its objections to order appointing Temporary Trustee and supplemental orders, and its notice of motion to set aside said order and supplemental orders;

That thereafter, and on the 31st day of October, 1934, said Henry Barker, as Temporary Trustee, filed his statement of points and authorities in reply to said objections to order appointing Temporary Trustee and supplemental orders;

That thereafter, and on the 15th day of November, 1934, Crocker First National Bank of San Francisco, Central Bank of Oakland, Edmond G. Soule, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt and William B. Faville, as creditors of said Oakland Hotel Company, filed

their verified answer to said Oakland Hotel Company's petition wherein they controverted facts alleged in said petition and prayed for a dismissal thereof;

That on said 15th day of November, 1934, the above named creditors filed in said matter their opposition to the debtor's request for an order placing the debtor in possession, which opposition was supported by the affidavit of James A. Wainwright.

It further appearing to the above entitled Court that said petition and answer, said motion to set aside said order appointing Temporary Trustee and supplemental orders, and said opposition to the debtor's request for an order placing debtor in possession, came on regularly for hearing this 19th day of November, 1934.

NOW, THEREFORE, IT IS HEREBY ORDERED that the issues made by said petition and answer, said motion to set aside said order appointing Temporary Trustee and supplemental orders, and [67] said opposition to the debtor's request for an order placing the debtor in possession, which issues shall include the following: (a) whether the petition of Oakland Hotel Company for relief under Section 77B of the National Bankruptcy Act should be dismissed as prayed in the creditors' answer on file herein; (b) whether, in the event said petition is not dismissed, this court shall make permanent the appointment of Henry Barker as such trustee or shall terminate such appointment

and restore the debtor to possession, or shall appoint a substitute Trustee or Trustees or an additional Trustee or Trustees; be and they are hereby referred to W. A. Beasly as Special Master to take testimony, ascertain the facts and report said facts with his conclusions and recommendations thereon.

DONE IN OPEN COURT this 19th day of November, 1934.

FRANK H. KERRIGAN
Judge of the United States District Court

The undersigned hereby consent to the making of the above order.

ROBBINS & VAN FLEET
Attorneys for Oakland Hotel Company, petitioning debtor.

FITZGERALD, ABBOTT & BEARDSLEY
CHICKERING & GREGORY
Attorneys for answering creditors.

[Endorsed] Filed Nov. 22, 1934 10:17 A. M.
WALTER B. MALING, Clerk. [68]

[Title of Court and Cause.]

DEBTOR'S MOTION TO DISMISS CREDITOR'S ANSWER TO DEBTOR'S PETITION.

Now comes OAKLAND HOTEL COMPANY, petitioner and debtor in the above entitled action, and moves to dismiss the creditors' answer to its

petition on the following grounds:

I.

That said answer does not state facts sufficient in law or fact to constitute an answer to debtor's petition.

II.

That creditors' answer to debtor's petition, insofar as the facts are alleged therein, is not a pleading contemplated by Section 77B of the Bankruptcy Law;

III.

That said answer does not state the proper grounds of law or fact upon which to base a dismissal of the debtor's petition;

IV.

That the material allegations of the petition of the debtor are not denied, but admitted; [69]

V.

That the bankruptcy court has acquired jurisdiction of the debtor and all his property and assets and of all his creditors, secured and unsecured, and of all his stockholders and that there is nothing in the creditors' answer which shows lack of such jurisdiction; but, rather, the jurisdictional facts are admitted in said pleading;

VI.

That said answer is a challenge to the paramount authority of the bankruptcy court to administer the estate of the debtor;

storation of possession of the property and the prayer for permission to propose a plan of reorganization. The Oakland Hotel Company, by its attorneys, objected to the sufficiency of the answer and the entire matter was set down for hearing and, after being duly noticed, was heard by consent on the 30th day of November, 1934, at which time I ruled that the questions raised could not be decided upon the face of the pleadings and papers in the case as there was a distinct conflict in the allegations of the creditors and the debtor; thereupon, on the 17th of December, 1934, I began the taking of evidence and th objections to a sufficiency of the reply of the creditors was again raised and the ruling was again made that before deciding the questions involved, evidence should be heard. To both rulings above indicated, the debtor took exception.

THE QUESTIONS INVOLVED.

The final questions arising out of the reference are these:

(a) Whether the petition of Oakland Hotel Company for relief under Section 77-B of the Bankruptcy Act should be dismissed;

(b) Whether, in the event said petition is not dismissed, this Court shall make permanent the appointment of Henry Barker as trustee, or shall terminate such appointment and restore the debtor to possession, or shall substitute another trustee or trustees, or additional trustee or trustees for said Barker.

THE FACTS.

The amount of outstanding bonds of the corporation is correctly stated in the creditors' answer. These bonds are secured by a trust deed indenture under which Crocker First National Bank of San Francisco is the trustee; [73]

2nd. Paragraph III. of the creditors' answer is true. That is to say, the bonds owned by the creditors stated in said Paragraph III. are of the face value of $387,000 and that said creditors have provable claims which amount in the aggregate in excess of security held by them (namely, the security of said trust indenture) to more than $1000;

3rd. The nature of the business of the corporation was a hotel business. The said corporation is unable to meet its debts as they mature and it desires to effect a plan of reorganization and said petition on its face states the necessary jurisdictional facts to entitle it to consideration. Ninety-five per cent of the capital stock of the debtor corporation is owned by the Chas. Jurgens Co., which, so far as appears by the evidence, is a reliable corporation with assets which may be applied in the reorganization of the corporation debtor. The petition of the debtor is filed in good faith and there is need for reorganization of the corporation as will appear from the transcript submitted herewith, Messrs. Beardsley and Green, representing the creditors and the trustee under the trust indenture,

agreed that a reasonable time should be given the debtor to propose a plan of reorganization.

Upon the issue of the retention of the trustee, I find that Barker, the trustee, has been managing the Oakland Hotel for a period of two years and eight months, under an appointment by the Superior Court of the State of California for Alameda County; that he has managed the property successfully; the income from operating the property during his management has improved; that this improvement is due to cutting expenses of operation and also to the improved general business conditions in the City of Oakland and the State of California; that Mr. W. C. Jurgens, President of The Chas. Jurgens Co., will become general manager of the hotel if the possession **[74]** and management of the hotel are returned to the debtor corporation, and that he will employ an experienced hotel keeper to be directly in charge and manage the hotel; that Mr. Jurgens, himself, was manager of the hotel before the appointment of the receiver by the Superior Court of the State of California and that during the time he was manager, the hotel rapidly ran behind on its expenses, which exceeded its income. It was at that time managed as a first class hotel in every particular, with high salaried employees and if the hotel is returned to the Oakland Hotel Company now, Mr. Jurgens will endeavor to place it upon the same footing on which it was conducted under his management. The evidence shows that if the debtor is restored to pos-

session of the property, it is his intention to increase the operating expenses of the Hotel Oakland by paying higher salaries to employees and furnishing a more expensive service generally, and that it would take time to readjust the scale of expense of the hotel and to re-establish its former character. That to change management now would be a distinct detriment to the property of the corporation and that it is for the best interests of the debtor and the creditors that Mr. Barker should be continued as trustee, at least until a plan of reorganization has been proposed, and that Mr. Barker should be further continued in control and management of the property of the corporate debtor until such time as the Court shall determine either that the proposed plan is and should be approved or until it determines that the plan is not approved and the Court takes final action as to the dismissal or liquidation of the corporation.

OPINION ON THE FACTS.

In my opinion it is impossible to determine whether a plan of reorganization can be proposed that will be acceptable to the creditors or to a sufficient percentage of the creditors [75] at this time. That can only be determined when the plan of reorganization has been proposed, for it appears from the evidence, not extensive it is true, but by a statement of Mr. W. C. Jurgens, the President of The Chas. Jurgens Co. on the witness stand, that The Chas. Jurgens Co. has assets that may be used

in addition to the assets of the corporation itself for the purpose of reorganization of the corporation. Whether or not the use of these assets can and will be proposed or whether any other plan will be proposed that will meet with the approval of the creditors, it is impossible, in my opinion, to say. The bondholders themselves are in this position: The Committee on reorganization, together with Mr. Soule, a large bondholder, and the Central Bank of Oakland, another large bondholder, have control of what appears to be an overwhelming majority of the bonds. However, this agreement by which this Committee holds these bonds has expired by limitations of its own terms and the Committee now holds the bonds only pursuant to a lien thereon for moneys expended in connection with the Committee's activities.

At a conference in my office held this morning, at which the attorneys for the various interests were all present, I undertook to ascertain how long a time the various parties considered that it would be proper to allow the corporate debtor within which to propose its plan. The creditors, speaking through Mr. Beardsley, were liberal in the matter and Mr. Robbins, representing the debtor corporation suggested that the time for proposing the plan be extended to the first of February, 1935. To this Mr. Beardsley and Mr. Green agreed and I thereupon stated that I was ready to make recommendations upon that subject. My recommendations pursuant to the above statement are these:

1. That Barker, the trustee, be continued in possession of the property until such time as the plan shall be proposed and the creditors have a reasonable time within which either [76] to approve or disapprove the same;

2. That the debtor corporation's petition be not dismissed, but that the debtor be given until and including the first day of February, 1935 within which to file its proposed plan with the Court; that said time be not extended for the reason that the property has already been in the hands of the bondholders' receiver, under appointment of the Superior Court, for a period of nearly three years and that the matter should be brought to a conclusion, and that, therefore, the time fixed for the proposal of the plan be made final.

Dated: San Francisco, California. December 19th, 1934.

W. A. BEASLY,
Special Master.

Submitted herewith are the following documents and papers:

1. Petition to be allowed to obtain the Relief Provided by Said Section 77B.
2. Creditors' Answer to Debtor's Petition;
3. Objections to Sufficiency of Creditors' Answer and Motion to Dismiss.
4. Creditor's Opposition to Debtor's Request for Order Placing Debtor in Possession.
5. Transcript of the Testimony.

6. All exhibits referred to in said Transcript of Testimony.

[Endorsed] Filed Dec 27, 1934 1:15 PM
WALTER B. MALING, Clerk. [77]

[Title of Court and Cause.]

SUPPLEMENTAL REPORT OF SPECIAL MASTER.

TO THE HONORABLE UNITED STATES DISTRICT COURT AND TO THE HONORABLE FRANK H. KERRIGAN, JUDGE THEREOF:

Since drafting the report attached hereto, Mr. Robbins called me up and asked that the date for proposing a plan of reorganization be extended to the first of March. In consultation, on the telephone, with Mr. Beardsley, he suggested that he was willing to agree to the fifteenth of February, 1935 being fixed as the time for filing the plan. I called Mr. Robbins this morning and he agreed to this. So, I recommend that the Court fix the 15th of February, 1935 as the date for filing a proposed plan of reorganization and that it be made clear to counsel for both the creditors and the debtor that no extension will be granted for the reasons given in my report.

Dated: San Francisco, California. December 20, 1934.

W. A. BEASLY,
Special Master.

[Endorsed] Filed Dec 27, 1934 1:17 P.M.
WALTER B. MALING, Clerk. [78]

ROBBINS & VAN FLEET
Crocker Building,
San Francisco, California,
Attorneys for Debtor.
CHICKERING & GREGORY
Merchants Exchange Building,
San Francisco, California;
FITZGERALD , ABBOTT & BEARDSLEY,
Central Bank Building
Oakland, California,
Attorneys for Creditors.

[Title of Court and Cause.]

OBJECTIONS TO SUFFICIENCY OF CREDITORS' ANSWER AND MOTION TO DISMISS [79]

The first issue before the court is raised by Creditors' Answer to Debtor's Petition and the first question as to Creditors' Answer is whether parties signing said Answer are in court in any capacity.

Upon the state of the record at the present time these parties are not before the court in any capacity and have no authority under Section 77B of the Bankruptcy Act to file an answer.

Section 77B provides (end of paragraph a)

"If three or more creditors who have provable claims which amount in the aggregate

in excess of the value of securities held by them, if any, to $1,000 or over, or if stockholders holding 5 per centum in number of all shares of stock of any class of the debtor outstanding shall, prior to the hearing provided for in subdivision (c), clause (1), of this section appear and controvert the facts alleged in the petition or answer, the judge shall determine as soon as may be the issues presented by the pleadings, without the intervention of a jury, and unless the material allegations of the petition or answer are sustained by the proofs, the proceedings shall be dismissed."

Mr. Beardsley stated at the hearing on November 30th, 1934, Record pp. 8-9:

Mr. BEARDSLEY: I understand that none of them have withdrawn the bonds or offered to withdraw the bonds. The understanding is, as far as the bondholders are concerned, as far as I know, all of the bondholders are in complete accord with the position taken. The bondholders have acted in unity in all proceedings in the last three years and are taking that position, not directly or indirectly, as to the petition of the debtor to take this property from the trustee, from the receiver appointed in the state court, who was appointed pursuant to the terms of the bond indenture, and to [80] "turn it back to the debtor to be further dissipated, and we represent that sentiment and represent it from all angles, from the standpoint of the trustee under the bond issue, from the standpoint

of our individual clients like the Central Bank of Oakland and Kate M. Carpentier, who own in the neighborhood of $150,000 to $250,000 of the $660,000 outstanding bonds, and represent it from the standpoint of the receiver appointed by the Superior Court, and represent it from the standpoint of the bondholders' committee, who at all times has acted in cooperation with the trustee under the bond issue and with the receiver and the person who now is the temporary trustee. That is the position of Fitzgerald, Abbott & Beardsley, and myself personally in this case and indirectly, I take it, of Chickering & Gregory. We are all working together to preserve this security for the creditors and prevent its dissipation by the debtor, its further dissipation.

MR. VAN FLEET: And prevent this proceeding going ahead.

MR. BEARDSLEY: Not prevent its going ahead; having it terminated.

MR. VAN FLEET: Terminated. That is all I want. There is no antagonism. I just want a statement. That is all."

It follows, therefore, that the parties signing and presenting Creditors' Answer to Debtor's Petition have no standing in court for the following reasons:

1. They have assigned all their bonds to a bondholders' committee and have no provable claims against the debtor;

In re *E. T. Kenney Co.,* 136 Fed. 451; [81]

Quindry on Bonds and Bondholders, 1934, Vol. 1, §435;

II. The claims of the bondholders are unliquidated and are not provable claims until after liquidation according to the provisions of the Bankruptcy Act.

In re E. T. Kenney Co., 136 Fed. 451

(63 (b) U. S. C A Title II, §103 of Bankruptcy Act.)

III. There is no way to liquidate these claims at the present time and therefore they are not provable claims;

Sec. 57 of Bankruptcy Act U. S. C.A. Title II, Sec. 93 par. (h).

IV. The bondholders' agreement of December 2, 1931, in evidence here constitutes an express trust with the bondholders committee trustees holding the legal title to the bonds.

See: *Bullard v. Cisco,* 290 U. S. 179, as to a similar agreement. The Supreme Court said: at p. 189:

> "We are of opinion that the purpose of the agreement of January 3, 1930, was not to create a mere collection agency, nor to set up a merely colorable device for circumventing restrictions on federal jurisdiction, but to put the bonds and coupons—the owners of which were numerous and widely scattered—into an express trust—to be managed and administered by four trustees—for the purpose of conserving, salvaging and adjusting the investment—

the muncipal debtor having become financially embarrassed. The depositing owners, or succeeding certificate holders, were to be the cestuis que trustent or beneficiaries. The plaintiffs were to be the trustees. Although not called trustees in the agreement, they necessarily had that status by reason of the rights, powers and duties expressly assigned to them. There was a distinct declaration that they should have full title to the deposited bonds and coupons, and this was fortified by other provisions defining the control and power of disposal which the trustees were to have over them.

Counsel for the defendant inquire—If the committee were to be the legal owners of the bonds and coupons, why were they authorized [82] to borrow money and pledge the bonds and coupons for its repayment, as also to do other things which legal owners would be free to do without special authorization. The answer is obvious. The title and authority confided to the persons constituting the committee were confided to them as trustees, and not in their personal right, and there was need for carefully and fully defining the authority; for trustees are not permitted to go beyond such as is given expressly or by necessary implication."

V. A principal-agency relationship does not exist between bondholders and committee and bond-

holders exercise no control over them.

Comm'r of Internal Revenue v. Tyler,
72 Fed. (2d) 950;

Habirshaw Electric Cable Co. v. *Habirshaw,*
296 Fed. 875;

VI. The bondholders' agreement is a binding contract and so long as the committee does not violate its trust the bondholders cannot withdraw their claims except in accordance with its terms. *Habirshaw Electric Cable Co.* v. *Habirshaw,* supra.

VII. This court cannot determine in this proceeding that the agreement is not binding but must recognize the agreement. This court has no power to terminate the agreement.

Habirshaw Electric Cable Co. v. *Habirshaw,*
296 Fed. 875.

> "The committees are of course trustees or fiduciaries for certain purposes but the fundamental point is that these deposit agreements are contracts."
>
> (Quoted from above case at p. 881).

VIII. The termination of this contract Bondholders' Agreement of December 21, 1931, must be by plenary suit with all the parties to the agreement before the court.

ROBBINS & VAN FLEET,
Attorneys for Debtor.

Filed December 27, 1934, at 1:17 PM [83]

[Title of Court and Cause.]

ORDER CONTINUING HENRY BARKER, TRUSTEE, IN POSSESSION OF DEBTOR'S PROPERTY AND DETERMINING TIME WITHIN WHICH A PLAN OF REORGANIZATION MUST BE PROPOSED

It appearing to the above entitled court:

That Oakland Hotel Company did, on the 18th day of October, 1934, file in the above entitled matter its application for relief under Section 77B of An Act of Congress of the United States of July 1, 1898, entitled: "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES, AS AMENDED JUNE 7, 1934";

That thereafter, and on the 23rd day of October, 1934, the above entitled court, after proceedings to that end duly and [84] regularly had and taken, made its order approving said petition as properly filed, appointing Henry Barker as Temporary Trustee of the debtor's estate, setting Monday, November 19, 1934, in the courtroom of this court as the time and place for hearing on the question of the permanent possession of debtor's estate, and prescribing the notice to be given of said hearing.

That notice was given to creditors and stockholders of Oakland Hotel Company of said hearing in the manner and for the time prescribed by said order of October 23, 1934, and said Section 77B of

the National Bankruptcy Act;

That on October 29, 1934, said Oakland Hotel Company filed in said matter its objections to order appointing Temporary Trustee and supplemental orders, and its notice of motion to set aside said order and supplemental orders;

That thereafter, and on the 31st day of October, 1934, said Henry Barker, as Temporary Trustee, filed his statement of points and authorities in reply to said objections to order appointing Temporary Trustee and supplemental orders;

That thereafter, and on the 15th day of November, 1934, Crocker First National Bank of San Francisco, Central Bank of Oakland, Edmond G. Soule, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt and William B. Faville, as creditors of said Oakland Hotel Company, filed their verified answer to said Oakland Hotel Company's petition wherein they controverted facts alleged in said petition and prayed for a dismissal thereof;

That on said 15th day of November, 1934, the above named creditors filed in said matter their opposition to the debtor's request for an order placing the debtor in possession, which opposition was supported by the affidavit of James A. Wainwright.

That said petition and answer, said motion to set aside said order appointing Temporary Trustee and supplemental orders [85] and said opposition to the debtor's request for an order placing debtor in possession came on regularly for hearing on the

19th day of November, 1934, at which time the above entitled court made its order referring the issues made by said petition, answer, motion and opposition, to W. A. Beasly as Special Master, to take testimony, ascertain the facts and report said facts with his conclusions and recommendations thereon. That thereafter and after a full hearing before said W. A. Beasly, as such Special Master on said issues, to-wit, on the 19th day of December, 1934, said W. A. Beasly filed herein his report of Special Master wherein he made a finding of facts rendered an opinion on the facts, and made the following recommendations:

"1. That Barker, the trustee, be continued in possession of the property until such time as the plan shall be proposed and the creditors have a reasonable time within which either to approve or disapprove the same;

"2. That the debtor corporation's petition be not dismissed, but that the debtor be given until and including the first day of February, 1935 within which to file its proposed plan with the Court; that said time be not extended for the reason that the property has already been in the hands of the bondholders' receiver, under appointment of the Superior Court, for a period of nearly three years and that the matter should be brought to a conclusion, and that, therefore, the time fixed for the proposal of the plan be made final."

That thereafter and on the 20th day of December, 1934, said W. A. Beasly filed herein his sup-

plemental report of Special Master amending said report of Special Master by extending the [86] recommended time within which a proposed plan of reorganization should be filed from February 1, 1935 to February 15, 1935.

It further appearing to the above entitled court that no objections have been taken to said report of Special Master and supplemental report of Special Master by either Oakland Hotel Company, the petitioning debtor, or said answering creditors, but that said debtor and answering creditors have agreed, through their attorneys, that the following statements contained in said report and appearing on page 4 thereof; to-wit: (a) "that during the time he (Mr. Jurgens) was manager, the Hotel rapidly ran behind on its expenses, which exceeded its income," and (b) "that if the debtor is restored to possession of the property, it is his (Mr. Jurgens) intention to increase the operating expenses of the Hotel Oakland by paying higher salaries to employees and furnishing a more expensive service generally, and that it would take time to readjust the scale of expense of the Hotel and re-establish its former character," shall not be conclusive against said debtor as to the merits of said debtor's management or its intentions if restored to possession of the property.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That said report of Special Master and said

supplemental report of Special Master, subject to the agreement hereinabove mentioned, be, and they are, hereby approved and confirmed as filed herein.

2. That due and legal notice of the time and place of the hearing on the question of the permanent possession of the debtor's property, which question came on regularly for hearing on the 19th day of November, 1934, has been given in all respects as required by law and by said order of October 23, 1934.

3. That the appointment of Henry Barker as Trustee of [87] the estate of the above named debtor be, and the same is, hereby continued until further order of this court, and that the bond of said Trustee in the sum of $10,000 heretofore given by said Trustee for the faithful performance of his duties as such Trustee, and filed in these proceedings, shall stand. Said bond is hereby approved and said Trustee is hereby authorized to pay the premium on said bond out of the debtor's estate.

4. That the order approving petition under Section 77B, Bankruptcy Act, and appointing temporary trustee, made and entered in the above entitled matter on October 23, 1934, as supplemented by this court's order of October 25, 1934, and as hereinafter supplemented and modified, be, and it is, hereby continued in full force and effect, and said Henry Barker, as such Trustee, be and he is hereby authorized to administer the assets and conduct the business of the debtor's estate herein, and to manage and operate and to receive and collect

the rents, issues and profits from the business and property of the debtor's estate, subject to the provisions of, and with all the powers and authority granted by, said order as supplemented and/or modified.

5. That the date on or before which a proposed plan of reorganization must be filed be, and it hereby is fixed as the 15th day of February, 1935. That said time within which a proposed plan of reorganization must be filed shall not be hereafter extended. That if a proposed plan of reorganization is not filed herein on or before the 15th day of February, 1935, this court shall dismiss this proceeding or direct the estate of said debtor to be liquidated as the interests of the creditors and stockholders may equitably require.

Dated ~~done in open court~~ this 10th day of January, 1935.

FRANK H. KERRIGAN
Judge of the United States District Court.

[88]

The undersigned hereby approves the above order.

W. A. BEASLY,
Special Master.

The undersigned hereby consent to the making of the above order.

ROBBINS & VAN FLEET
Attorneys for Oakland Hotel Company, petitioning debtor

FITZGERALD, ABBOTT & BEARDSLEY
CHICKERING & GREGORY
Attorneys for answering creditors

5

[Endorsed] Filed Jan 10, 1934 12:03 P.M.
WALTER B. MALING, Clerk. [89]

Robbins & Van Fleet,
Crocker Building,
San Francisco, California,
Attorneys for Debtor.
Chickering & Gregory,
Merchants Exchange Building
San Francisco, California,
Fitzgerald, Abbott & Beardsley,
Central Bank Building,
Oakland, California,
Attorneys for Creditors.

[Title of Court and Cause.]

[Endorsed] Filed Feb 14, 1935 11:19 A.M.
WALTER B. MALING, Clerk.

PLAN OF REORGANIZATION PROPOSED BY OAKAND HOTEL COMPANY, DEBTOR

[90]

PLAN OF REORGANIZATION PROPOSED BY OAKLAND HOTEL COMPANY, DEBTOR

Oakland Hotel Company, the debtor herein, respectfully shows the above entitled court that on the 10th day of January, 1935, the above entitled court, Honorable Frank H. Kerrigan, presiding, made an order finding upon the recommendation of W. A. Beasly, Special Master, that there is need for reorganization of the debtor corporation, as appears after a full hearing had before the said Special Master and the attorneys for the creditors and trustee under the trust indenture having agreed that a reasonable time should be given the debtor for a proposed plan of reorganization. The said Oakland Hotel Company, debtor, has prepared such plan of reorganization and sought to submit the same to the trustee under the trust indenture for its consideration. The said trustee refused at this time to consider said plan of reorganization, being thereunto so advised by its attorneys. The Oakland Hotel Company, debtor, therefore, in accordance with said order, proposes said plan directly to this court and asks the court to either refer the same for consideration to the aforesaid Master or to consider the plan itself, at a duly noticed hearing, whichever procedure may commend itself to the discretion of this court.

Oakland Hotel Company further asks the court to direct the Master or its clerk to duly give notice that such plan has been filed by publication in a newspaper of general circulation, preferably in the City of Oakland, County of Alameda, State of California, at least once a week for a period of two weeks before the date set for the hearing of said plan of reorganization and by mailing a copy of said notice to the stockholders and creditors of said corporation (at their last known places of address) together with a copy of said plan of reorganization which said copies the said company is furnishing the court herewith. [91]

Comes now the Oakland Hotel Company, debtor herein, and proposes the following plan of reorganization and agrees to carry the same into effect, if it is accepted and confirmed as required by Section 77B of the Bankruptcy Act, as amended.

ARTICLE I.
Value of Plant.

According t o the government method of appraisal, as we are informed, that the government uses in its various boards and taking the figures from the evidence submitted to the Master, as appears in the transcript of the hearing before the Master, the value of the plant is estimated as follows:

	Original Cost	Reproduction Cost	Income
Land	$ 227,131.79	$ 550,000.00	
Building	1,301,955.01	2,000,000.00	
Equipment	304,525.08	201,900.00	
	$1,883,611.88	$2,751,900.00	$ 526,000.00
Insurance Appraisal, 1932			
Land			
Building	$1,026,600.00		
Equipment	201,900.00		
	$1,228,500.00		
Original cost		$1,833,611.88	
Reproduction cost		2,751,900.00	
Income Basis		526,000.00	
		$5,111,511.88	
Divide by 3 to get average			$1,703,831.29

ARTICLE II.

Bonds.

1. Final maturity of bonds to be extended to January 1, 1950.

2. Amortization or retirement or redemption, under Art. 6, Section 1-4 of trust agreement, of bonds now past due and future amortization or retirement or redemption to be deferred until maturity of bonds.

3. Straight income bonds until January 1, 1940. These bonds to receive prorata each year for the five year period from January 1, 1935 to January 1, [92] 1940, all net earnings derived from operation after payment of all current operating expenses, all current taxes and insurance and assessments, if any, interest and amortization of delinquent taxes.

4. Trust indenture to provide that no interest shall accumulate to the bonds during this five year

period in excess of what may be derived from above net earnings.

5. In the event that income for any one year during this period should exceed 3 per cent interest on bonds, then such excess shall be funded for future payment of interest.

6. Trust indenture to provide that interest shall be payable semi-annually beginning July 1, 1940, as follows:

Beginning July 1, 1940 to July 1, 1942, at 3%;
Beginning July 1, 1942 to July 1, 1944, at 4%;
Beginning July 1, 1944 to July 1, 1950, at 5%.

The trust indenture to provide that on and after July 1, 1942, the trustee shall be entitled to possession of the property at any time if the interest paid to holders of bonds then outstanding on the four immediately preceeding semi-annual distributions shall not have aggregated 6% of the principal amount of bonds outstanding at such time or unless the trustee agrees to further extension.

ARTICE III.

Stock.

1. Preferred stock of the corporation to be made common and all the obligations of the preferred stock to be wiped out.

2. All stock to be common stock of the same amount of shares as the common and preferred heretofore combined, to-wit, thirty thousand (30,000) shares.

3. The stock structure heretofore was as follows:

Authorized	10,000	Preferred
	20,000	Common
Issued	8,644	Preferred
	486	Common
Total Issued	9,130	

Of this issue, the Charles Jurgens Company owns 8,287 Preferred—388 Common, or 8675.

The remainder of the 9130 shares of stock issued in small holdings. [93]

It is now proposed by the company that 10 shares of common stock be issued to each bondholder for each bond from unissued stock to compensate bondholders for lost interest since 1931 and for deferring the foreclosure of their bonds.

Under the new set-up, therefore, the bondholders would have 6600 shares of common stock as against 9130 shares already issued.

4. In addition, it is hereby proposed that all stock except the bondholders' stock, or at least all stock held by The Chas. Jurgens Company, or the Jurgens heirs, be placed in escrow with a bond trustee until January 1, 1945, to be turned over to the bondholders if the payments of interest in the two years previous do not reach six per cent of the outstanding bonds; the voting power, however, to be retained by the stockholders in the meantime. In

other words, if the operating income of the corporation does not exceed the operating expenses to an appreciable extent, the entire property shall be turned over to the bondholders on or after January 1, 1945.

ARTICLE IV.

Directors.

1. Bondholders to be represented by two directors.

2. Minority stockholders to be represented by one director selected to be acceptable to bondholders and the hotel company.

3. Majority stockholders to be represented by two directors.

4. If necessary, directors are to be allowed, to borrow temporarily to take care of emergencies.

ARTICLE V.

Taxes.

1. Delinquent taxes, amounting to $57,321.20 plus 7% interest from July 1, 1934, to be bonded according to state law on a 10% basis, if paid before April 20, 1935.

This installment of $5,732.00 plus interest, as appears from the transcript of the hearing before the Master, may be met out of income of the hotel or by a small loan.

ARTICLE VI.
Unpaid Interest and Notes.

1. Payments on delinquent bond interest, unsecured indebtedness and unpaid notes to be deferred until maturity of bonds January 1, 1950. **[94]**

2. Payment on any claim that Wood Bros. may have to be deferred until maturity of bonds January 1, 1950.

ARTICLE VII.
Management.

1. The expense of management is to be reasonable and only reasonable capital expenditures are to be made when, in the discretion of the board of directors they are necessary, and not to exceed the sum of $15,000.00 in any one year without the consent of the Bondholders' Trustee.

ARTICLE VIII.
Trust Deed.

1. Trust deed to be amended to comply with changes outlined, if approved by the court.

ARTICLE IX.
Debtor.

1. Debtor Corporation to be returned to possession and administration of the property.

ARTICLE X.
Amendment of Reorganization Plan.

1. The plan of reorganization may be amended

or supplemented provided the modifications do not materially affect the rights of the bondholders or stockholders.

ARTICLE XI.

Defaults.

1. If any defaults occur, reasonable time to be given to relieve the defaults by agreement with Bondholders' Trustee.

ARTICLE XII.

Reports.

1. Monthly statements of the business done by the hotel and periodic audits are to be made to Trustee for Bondholders.

If the plan is carried into effect in the reorganization proceedings, it will not become effective unless and until it shall have been accepted in the manner provided in Section 77B by or on behalf of holders of two-thirds in amount of the bonds and confirmed by the judge, but upon such confirmation it shall be binding upon all holders of bonds, including those who have not, as well as [95] those who have, accepted it; provided, however, that if the holders of two-thirds in amount of the bonds do not so accept the plan, it may be confirmed by the judge if at the election of the objecting bondholders they accept the securities allotted to them under the plan or if the judge approves some method as will, in the opinion of the judge, under and consistent with the circumstances of the particular

case, equitably and fairly provide adequate protection for the realization by them of the value of their claims.

The other creditors are The Chas. Jurgens Co., and the claimant under the Wood Brothers' lease. The Chas. Jurgens Co., as appears from the proposed plan, have deferred any payments on their claim until after January 1, 1950, or until the bondholders have been paid pursuant to the proposed plan.

As to the claimants under the Wood Bros. lease, their claim has not been determined, and may be contested, but it should be deferred until the payment of the other unsecured claims.

Respectfully submitted,
Oakland Hotel Company,
By W. C. Jurgens, President.

Robbins & Van Fleet,
Attorneys for Debtor.

United States of America,
Northern District of California,
Southern Division—ss.

W. C. Jurgens, being first duly sworn, deposes and says:

That he is the President of the Oakland Hotel Company, a corporation, the debtor herein; that he has read the foregoing Plan of Reorganization and knows the contents thereof; that the statements of fact therein contained are true; that he

has been duly authorized to propose the foregoing Plan of Reorganization by resolution of the Board of Directors of the debtor adopted at a meeting thereof duly held on the 24th day of September, 1934, at its office at Hotel Oakland, Oakland, California, which resolution is on file herein and part of the records of this proceeding.

W. C. Jurgens.

Subscribed and sworn to before me this 14th day of February, 1935.

[Seal] W. W. Healey

Notary Public in and for the City and County of San Francisco, State of California. [96]

[Title of Court and Cause.]

ORDER FIXING TIME AND PLACE OF HEARING FOR CONSIDERATION OF PROPOSED PLAN OF REORGANIZATION, AND DIRECTING NOTICE THEREOF TO BE GIVEN

The debtor on February 14th, 1935, having filed herein a proposed plan of reorganization, designated "Plan of Reorganization Proposed by Oakland Hotel Company, Debtor,"

IT IS HEREBY ORDERED that March 26, 1935, at the hour of 10:00 o'clock A. M. or as soon thereafter as the matter can be heard, in the court room of this court, be and they are hereby fixed as the time and place of the hearing for the con-

sideration of said proposed plan, and for the consideration of the confirmation of said proposed plan, and of a dismissal of said proceedings, and of all other matters incidental thereto, and for the making of such order or orders in reference thereto as may appear to be appropriate, at which hearing, or at an adjournment thereof, [97] the debtor and the creditors and stockholders of the debtor should have the right to be heard upon such question as may come before the court;

It is hereby further ordered that the temporary trustee give notice of said hearing to the debtor, creditors and stockholders, by publication thereof for at least once a week for two successive weeks before the hearing, and by mailing a copy of said notice and a copy of said proposed plan of reorganization, postage prepaid, by depositing the same in the United States Post Office in Oakland or San Francisco, California, addressed to the debtor in care of its attorneys, Messrs. Robbins & Van Fleet, Crocker Building, San Francisco, California, and addressed to the creditors and stockholders at their respective addresses as shown upon the list of creditors and the list of stockholders heretofore prepared by said trustee pursuant to the order of this court, the first publication and said mailing to be at least ten (10) days before the date herein fixed for said hearing;

It is hereby further ordered that the debtor forthwith deliver to the said trustee copies of said

proposed plan sufficient in number to permit the said mailing thereof.

Dated: San Francisco, California, March 6, 1935.

A. F. ST. SURE, Judge

The undersigned hereby consent to the making of the above order.

ROBBINS & VAN FLEET
Attorneys for Debtor

CHICKERING & GREGORY
FITZGERALD, ABBOTT & BEARDSLEY
Attorneys for Answering Creditors.

WAREN A. BEARDSLEY
Attorney for Temporary Trustee.

I recommend that the above order be made.

W. A. BEASLY
Special Master.

[Endorsed] Filed Mar. 6 1935 2:46 P. M.
WALTER B. MALING, Clerk [98]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING NOTICE TO CREDITORS AND STOCKHOLDERS

State of California,
County of Alameda—ss.

Henry Barker, being first duly sworn, deposes and says: At all times herein mentioned I was, ever since have been and now am, temporary trustee in

the above proceeding; on March 11, 1935, I mailed a copy of the annexed notice and a copy of the proposed plan of reorganization filed herein by the debtor (copies of said plan for the purpose of said mailing having been delivered to me by the debtor), postage prepared by depositing the same in the United States Post Office at Oakland, California, addressed to each of the creditors and stockholders of Oakland Hotel Company at their respective addresses as shown upon the list of creditors and the list of stockholders heretofore prepared by me pursuant to the order of this court, true copies of which lists are attached to the affidavits of mailing filed herein on or about November 2, 1934, and also addressed to the debtor in care of its attorneys, Messrs. Robbins and Van Fleet, Crocker Building, San Francisco, California, and also addressed to E. C. Street, Trustee in bankruptcy for Wood Bros. Holding Co., in care of Bernard Silverstein, Esq., 1212 Broadway, Oakland, California.

HENRY BARKER. [99]

NOTICE

IN THE SOUTHERN DIVISION OF the United States District Court, in and for the Northern District of California.

In the Matter of the Application of OAKLAND HOTEL COMPANY under Section 77B of an Act of Congress of the United States of July 1,

1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as Amended June 7, 1934".—No. 25428-K.

The debtor on February 21, 1935, having filed with the Clerk of the above Court a proposed plan of reorganization, designated "Plan of Reorganization Proposed by Oakland Hotel Company, Debtor,"

Notice is hereby given that TUESDAY, March 26, 1935, at the hour of 10 o'clock a. m. or as soon thereafter as the matter can be heard, in the courtroom of said Court, Room 332 Post Office Building, Seventh and Mission streets, San Francisco, California, has been fixed by the Court as the time and place for a hearing for the consideration of the said proposed plan, and for the consideration of the confirmation of said proposed plan, and of a dismissal of said proceedings, and of all other matters incidental thereto, and for the making of such order or orders in reference thereto as may appear to be appropriate, at which hearing, or at an adjournment thereof, the debtor and the creditors and stockholders of the debtor have the right to be heard upon such question as may come before the Court.

Dated March 8, 1935.

HENRY BARKER,
Temporary Trustee, Oakland Hotel Company.

CHARLES A. BEARDSLEY, 1516 Central Bank Building, Oakland California, Attorney for Temporary Trustee.

Mar 9-16-1935-(2t)

Subscribed and sworn to before me this 14th day of March, 1935.

[Seal] CONSTANCE E. MULVARY,
Notary Public in and for the County of Alameda, State of California.

[Endorsed] Filed Mar 15 1935-9:30 A. M.
WALTER B. MALING, Clerk. [100]

[Title of Court and Cause.]

AFFIDAVIT OF PUBLICATION.

State of California,
City and County of San Francisco—ss.

E. C. LUCHESSA, being first duly sworn, deposes and says:

That he is and at all times hereinafter mentioned was a citizen of the United States, over the age of twenty-one years and a resident of said City and County; and is and was at and during all said times the principal clerk of The Recorder Printing and Publishing Company, printers and Publishers of "THE RECORDER," a newspaper of general circulation printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California; that said

"THE RECORDER" is and was at all times herein mentioned, a newspaper of general circulation, as that term is defined by Section 4460 of the political Code; its status as such newspaper of general circulation having been established, pursuant to Section 4462, Political Code, by a decree of the Superior Court of the City and County of San Francisco Department No. 11 thereof, Hon. William P. Lawlor, Judge, made and entered on the 11th day of October, 1905, which said decree was was restored by a judgment given in the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, judge, made and entered on the 2d day of December, 1907, and recorded in Record Book 15, at page 155 thereof; and as provided by said Section 4460, is and at all said times was published for the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and is not and never was devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper had been established, printed and published in said City and County of San Francisco, State of California, at regular intervals for more than one year preceding the first publi-

cation of this notice herein mentioned; that said notice was set in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpariel, describing and expressing in general terms the purport and character of the notice intended to be given; that a Notice in the above entitled matter, of which the annexed is a true printed copy, was published in said newspaper on the following [101] dates, to-wit: March 9th and 16th, 1935; and further deponent sayeth not.

E. C. LUCHESSA

Subscribed and sworn to before me this 16th day of March 1935.

[Seal] C. R. HOLTON

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed] Filed Mar 18, 1935 10:56 A.M.
WALTER B. MALING, Clerk [102]

NOTICE.

IN THE SOUTHERN DIVISION OF the United States District Court, in and for the Northern District of California.

In the Matter of the Application of OAKLAND HOTEL COMPANY under Section 77B of an Act of Congress of the United States of July 1, 1898, entitled "An Act to Establish a Uniform System

of Bankruptcy Throughout the United States, as Amended June 7, 1934."—No. 25428-K.

The debtor on February 21, 1935, having filed with the Clerk of the above Court a proposed plan of reorganization, designated "Plan of Reorganization Proposed by Oakland Hotel Company, Debtor."

Notice is hereby given that TUESDAY, March 26, 1935, at the hour of 10 o'clock a. m. or as soon thereafter as the matter can be heard, in the court room of said Court, Room 332 Post Office Building, Seventh and Mission streets, San Francisco, California, has been fixed by the Court as the time and place for a hearing for the consideration of the said proposed plan, and for the consideration of the confirmation of said proposed plan, and of a dismissal of said proceedings, and of all other matters incidental thereto, and for the making of such order or orders in reference thereto as may appear to be appropriate, at which hearing, or at an adjournment thereof, the debtor and the creditors and stockholders of the debtor have the right to be heard upon such question as may come before the Court.

Dated March 8, 1935.

HENRY BARKER,
Temporary Trustee, Oakland Hotel Company.
CHARLES A. BEARDSLEY,
1516 Central Bank Building,
Oakland, California,
Attorney for Temporary Trustee.
Mar 9-16-1935-(2t) [103]

[Title of Court and Cause.]

CREDITORS' OPPOSITION TO CONFIRMATION OF DEBTOR'S REORGANIZATION PLAN

Crocker First National Bank of San Francisco, Central Bank of Oakland, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt, William B. Faville, Ralph W. Kinney, Edmond G. Soule and James A. Wainwright, herein referred to as creditors, present this their opposition to confirmation of the debtor's proposed reorganization plan, and allege as follows:

1. Crocker First National Bank of San Francisco is a national banking association and the trustee under the indenture referred to in paragraph VII of the debtor's petition under which indenture there are outstanding bonds issued by the debtor of the face value of $660,000.00; Central Bank of Oakland is a corporation organized under the laws of the State of California.

2. Said creditors are respectively the owners and holders of bonds issued under said indenture of the face value as follows:

Crocker First National Bank of San Francisco	$ 52,000.00
Crocker First National Bank of San Francisco as trustee under various trusts	56,000.00
Central Bank of Oakland	148,000.00

Central Bank of Oakland as trustee under various trusts	18,000.00

[104]

Kate M. Palmanteer	$12,000.00
Thomas A. Crellin	5,000.00
James K. Moffitt	12,000.00
William B. Faville	15,000.00
Edmond G. Soule	69,000.00

The bonds thus owned by said creditors are of the aggregate face value of $387,000.00, being more than 58% of said bonds outstanding.

3. Under date of December 21, 1931, a Bondholders Protective Agreement was entered into by bondholders holding bonds issued under said indenture, by which agreement said Ralph W. Kinney, Edmond G. Soule and James A. Wainwright were named as a bondholders' ccommittee; ever since said date said three persons last named have constituted and now constitute said committee; pursuant to the terms of said agreement said bondholders deposited their respective bonds with the depositary named in said agreement; said agreement expired according to its terms on June 15, 1933, and said bonds so deposited pursuant thereto now belong to the respective depositors subject only to a pro rata charge thereon provided for in said agreement to cover the expenses, debts and liabilities incurred by the committee, the amount whereof is not yet determined; bondholders owning in the aggregate bonds of the face value of

$583,000 executed said agreement and deposited said bonds with said depositary, and at all times since the deposit thereof said bonds have remained on deposit with said depositary; the bonds of the face value of $387,000.00 referred to in paragraph 2 hereof are included among said bonds thus deposited with said depositary; said Ralph W. Kinney, Edmond G. Soule and James A. Wainwright as such committee join with the above mentioned owners of said bonds of the face value of $387,000.00 in presenting this opposition to the reorganization plan proposed by the debtor. **[105]**

4. None of said bondholders owning said bonds of the face value of $387,000.00 have accepted said proposed reorganization plan; and each and all of the above-mentioned creditors respectively submit that said plan should not be approved, for the following reasons:

(a) Said plan does not provide in respect of the bondholders holding bonds of the face value of $660,000.00 issued under said indenture, or in respect to any of said bondholders, adequate or any protection for the realization by them of the value of their interests, claims or liens, although at least 58% of said class of creditors (namely, creditors mentioned in paragraph 2 hereof) have not accepted and will not accept and are definitely opposed to said plan, and although said plan deals with the interests, claims and liens of said class of creditors;

(b) Said plan is neither fair nor equitable, and

said plan discriminates unfairly in favor of stockholders of the debtor and against the creditors owning each and all of the bonds issued under said indenture;

(c) Said plan is not feasible;

(d) Said plan does not comply with the provisions of subdivision (b) of Section 77B of said Bankruptcy Act and in particular does not comply with clause (3), clause (4), clause (5), clause (7), clause (8) or clause (9) of said subdivision (b).

Wherefore, said creditors pray that the proposed plan of reorganization presented by the debtor be not confirmed, and this proceeding instituted by the debtor under said Section 77B be dismissed.

CHICKERING & GREGORY,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for said Creditors.

[Verification]

Filed March 20, 1935—10:57 A.M. [106]

[Title of Court and Cause.]

ORDER REFERRING SPECIFIED ISSUES TO SPECIAL MASTER

It appearing to the above entitled court:

That the debtor on February 14, 1935, filed herein a proposed plan of reorganization desig-

nated "Plan of Reorganization [107] Proposed by Oakland Hotel Company, Debtor";

That on March 6, 1935, this Court made an order fixing the time and place of the consideration of said proposed plan, and for the consideration of the confirmation of said proposed plan, and of a dismissal of said proceedings, and of all other matters incidental thereto, and for the making of such order or orders in reference thereto as may appear to be appropriate, and directing the temporary trustee to give notice thereof;

That said notice has been given in the manner and for the time specified in said order and as required by law;

That certain creditors of said debtor have filed an opposition to the confirmation of said proposed plan, and have prayed that said proposed plan be not confirmed, and that the proceedings instituted by the debtor under said Section 77B be dismissed;

That said matter came on regularly for hearing at the time and place specified in said order, to-wit, the 26th day of March, 1935, and was thereupon continued for further hearing to March 30, 1935, at the hour of ten o'clock, A. M., of said day in the court room of the above entitled court;

That when the matter came on for hearing, as aforesaid, the debtor, through his attorneys, raised an objection to the hearing and consideration of the proposed plan until the court should make an order (a) determining a reasonable time within

which the claims and interests of creditors and stockholders may be filed or evidenced; (b) the manner in which said claims and interests may be filed or evidenced and allowed, and for the purpose of the plan and its acceptance, the division of creditors and stockholders into classes, according to the nature of their respective claims and interests, and (c) providing for reasonable [108] notice of the determination of such matters, it being the contention of the debtor, through his attorneys, that until it had been determined under the act who the creditors and stockholders were in some authentic manner, they could not participate in the hearing upon the plan and that these requirements were jurisdictional.

NOW, THEREFORE IT IS HEREBY ORDERED that each and all of the matters the consideration of which was thus set for hearing before this court on said 26th day of March, 1935, be and they are hereby referred to W. A. Beasly as Special Master for hearing to take testimony, ascertain the facts and report said facts with his conclusions and recommendations thereon, said hearing to be held forthwith at the offices of said W. A. Beasly in the Grant Building at the corner of Seventh and Market Streets, San Francisco, California, or at such other time or times, and at such other time or times, as shall be ordered by said W. A. Beasly, and without further notice.

The said W. A. Beasly is also instructed to pass

upon the merits of the objection of the debtor, through his attorneys, herein set forth; if he determines that said objection is without merit, he may proceed with the hearing upon the plan as herein outlined. If he determines that such objection is meritorious, then he will proceed to give the various notices required for the determination of such matters and hold such hearings as he determines for the evidencing of the claims of the various classes of creditors and divide the said creditors into classes as set forth in the Act. [109]

Dated this 3rd day of April, 1935.

ALBERT M. SAMES,
Judge of the said Court.

Form of the above Order is hereby approved.

CHICKERING & GREGORY
FITZGERALD, ABBOTT & BEARDSLEY
Attorneys for Certain Creditors.
ROBBINS & VAN FLEET
Attorneys for Debtor

[Endorsed] Filed Apr. 3, 1935 4:43 P. M.
WALTER B. MALING, Clerk. [110]

[Title of Court and Cause.]

~~PROPOSED~~ ORDER FOR NOTICE AND ORDER APPROVING.

The debtor having presented a proposed plan of reorganization under Section 77B of the Bankruptcy Act, and it appearing that the hearing for

the consideration of said proposed plan, for the consideration of the confirmation of said proposed plan and of a dismissal of said proceedings, and of all other matters incidental thereto, and for the making of such order or orders in reference thereto as may appear to be appropriate, should be continued pending the filing, evidencing, classification and allowance of claims and interests of creditors and stockholders,

It is hereby ordered, subject to the approval of the United States District Judge, that;

1. Until and including the 31st day of May, 1935 will constitute a reasonable time within which the claims and interests of creditors and stockholders of the Oakland Hotel Company may be filed and evidenced, and that no claim or interest not filed within said time may participate in the proposed plan of reorganization except on order for cause shown, and claims and interests must be filed and entered within said time;

2. Claims and interests may be filed with W. A. BEASLY, [111] Special Master herein, at his office at No. 610 Grant Building, No. 1095 Market Street, San Francisco, California, and may be presented upon any of the usual forms upon which ordinary claims in bankruptcy are proved, and evidenced *prima facie* by the affidavit of the claimant or any authorized agent of the claimant. Interests of stockholders may be evidenced by the affidavit of the stockholder or his agent. The author-

ity of the agent may be proved by his own affidavit. The proof must designate whether or nor the creditor is secured or unsecured, and if secured, whether secured by a bond indenture, and if not, what security he holds, but need not, unless subsequently requested to do so, present or file the written evidence of indebtedness, such as bonds, notes, etcetera. For all purposes other than the acceptance of a proposed plan of reorganization, the claims of bondholders as a whole under the bond indenture described in the debtor's petition may be filed by the trustee under said bond indenture and evidenced *prima facie* by the affidavit of an agent of said trustee.

3. For the purposes of the plan and its acceptance creditors of the debtor are divided into two classes, namely, secured and unsecured. Stockholders are divided into two classes, namely, common stockholders and preferred stockholders.

4. A hearing upon the validity of said claims and interests, when said claims and interests will be allowed or disallowed, shall be held before the undersigned Special Master on the 3d day of June, 1935, at 10 o'clock A. M., and the hearing referred to at the commencement of this order is hereby continued to said time.

Notice of this order shall be given by publication in the San Francisco "RECORDER" for five (5) days beginning on or before the 22d day of APRIL, 1935, and by mailing, within said five-day

period of publication, copies of the notice so pub- [112] lished to the creditors and stockholders, named on the list heretofore filed herein by the temporary trustee, at their respective addresses as given in said list.

Dated: April 17, 1935

W. A. BEASLY
Special Master

APPROVED AND SO ORDERED
ALBERT M. SAMES
United State District Judge

[Endorsed] Filed Apr 17, 1935 4:21 P.M.
WALTER B. MALING. Clerk. [113]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING NOTICE TO STOCKHOLDERS AND CREDITORS

State of California
City and County of San Francisco—ss.

ROBERT C. GREEN, being first duly sworn, deposes and says:

That he is over the age of twenty-one years and is competent to be a witness in the above entitled matter; that on [114] Friday, the 19th day of April, 1935, he personally mailed a copy of the notice to stockholders and creditors, a copy of which notice is attached hereto, marked "Exhibit

A" and by this reference made a part hereof, to each of the stockholders and creditors of the Oakland Hotel Company named in that certain list of stockholders and creditors attached hereto, marked "Exhibit B" and by this reference made a part hereof, at the addresses following their respective names, by depositing a copy of said notice in the Post Office at San Francisco, California, directed severally to each of said stockholders and creditors with the postage fully prepaid on each notice.

That affiant has made diligent search and inquiry to ascertain the names and addresses of all stockholders and creditors of said Oakland Hotel Company and that the attached list of stockholders and creditors contains a full, true and complete list of all stockholders and creditors of said Oakland Hotel Company of which affiant has any knowledge, and sets forth the correct addresses of said stockholders and creditors so far as known to affiant.

ROBERT C. GREEN

Subscribed and sworn to before me this 26th day of April, 1935.

KATHRYN E. STONE

NOTARY PUBLIC in and for the City and County of San Francisco, State of California.

[Seal]

Filed May 23, 1935. at 4 P. M. [115]

NOTICE TO STOCKHOLDERS AND CREDITORS.

IN THE DISTRICT COURT OF THE United States for the Northern District of California, Southern Division.

In the Matter of the Application of OAKLAND HOTEL COMPANY, under Section 77B of An Act of Congress of the United States of July 1, 1898, entitled: "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as Amended June 7, 1934."—No. 25428-K.

Whereas, Oakland Hotel Company has proposed herein a plan of reorganization and has petitioned the Court that it be approved; and

"Whereas, the hearing heretofore set for the consideration of said proposed plan, for the consideration of the confirmation of said proposed plan and of a dismissal of said proceedings and of all other matters incidental thereto and for the making of such order or orders in reference thereto as may appear to be appropriate, having been continued pending the filing, evidencing, classification and allowance of claims and interests of creditors and stockholders, to ten o'clock a. m. on the 3rd day of June, 1935;

Now, therefore, notice is hereby given to the creditors and stockholders of the Oakland Hotel Company to file and evidence their claims and interests in this proceeding with the undersigned Special Master at his office at No. 610 Grant Build-

ing, No. 1095 Market Street, in the City and County of San Francisco, State of California, on or before the 31st day of May, 1935.

Creditor's claims may be presented upon any of the usual forms upon which ordinary claims in bankruptcy are proved and evidenced prima facie by the affidavit of the claimant or any authorized agent of the claimant. Interests of stockholders may be evidenced by the affidavit of the stockholder or his agent setting forth the number of shares held by such stockholder and whether the same are preferred or common stock. The authority of an agent may be proved by his own affidavit. The proof must designate whether the creditor is secured or unsecured, and if secured whether secured by a bond indenture and if not, what security he holds, but a creditor need not, unless subsequently requested to do so, present or file the written evidence of indebtedness such as bonds, notes, etc. For the purposes of the plan and its acceptance, creditors of the debtor are divided into two classes, namely, secured and unsecured. Stockholders are divided into two classes, namely, common stockholders and preferred stockholders.

No claim or interest not presented and proved within the time above stated may participate in the plan proposed except on order for cause shown.

Notice is also hereby given that a hearing upon the validity of said claims and interests, when said

claims and interests will be allowed or disallowed, shall be held before the undersigned Special Master on said 3rd day of June, 1935, at ten o'clock a. m., at the courtroom of the undersigned, in the Grant Building, No. 1095 Market Street, San Francisco, California, and that at said time and place a hearing will be held for the consideration of said proposed plan, for the consideration of the confirmation of said proposed plan and of a dismissal of said proceedings and of all other matters incidental thereto and for the making of such order or orders in reference thereto as may appear to be appropriate.

Dated: April 17, 1935.

W. A. BEASLY,
Special Master.
Apr 19-5t dly

Published in "The Recorder," 374 Pine Street, San Francisco, California. Phone MArket 5400. [116]

STOCKHOLDERS AND CREDITORS OF OAKLAND HOTEL COMPANY

STOCKHOLDERS

Balsdon, Carolyn S.
55 Alvarado Road
Berkeley, California

Capwell, H. C. Estate
14th and Clay Streets
Oakland, California

Carroll, Paul T.
764 Market Street
San Francisco, California

Corder, T. W. Inc.
Box 384
Oakland, California

M. C. Chapman and J. F. Conners
Executors of the estate of W. E. Dargie, Deceased
1212 Broadway
Oakland, California

Easton, Mary C.
1050 Green Street
San Francisco, California

Eccleston, J. Y.
364-34th Street
Oakland, California

Fitzgerald, R. M.
Central Bank Building
14th and Broadway
Oakland, California

Golden West Brewing Co.
5th and Kirkham Streets
Oakland, California

Heeseman, C. J.
Plaza Building
15th and Washington Streets
Oakland, California

Jurgens, Chas. Estate
1224 Broadway
Oakland, California

Jurgens, C. H.
1224 Broadway
Oakland, California

Jurgens, W. C.
Hotel Oakland
Oakland, California

Jurgens, Co. The Chas.
1224 Broadway
Oakland, California

Knowland, J. R.
Tribune Publishing Company
13th and Franklin Streets
Oakland, California

Lewis, Wm. Frisbie Co.
Henshaw Building
14th and Broadway
Oakland, California

Morris, H. C.
805 Realty Syndicate Building
1440 Broadway
Oakland, California

Pardee, Dr. Geo. C.
672-11th Street
Oakland, California

Snyder, A. J. Estate
Care, J. J. Warner, Administrator
430 California Street
San Francisco, California

Steel, Mrs. Bertha J.
838 Mendocino Avenue
Berkeley, California

Tasheira, A. G.
Bank of America Building
12th and Broadway
Oakland, California

Taylor, Jas. P.
Easton Building
13th and Broadway
Oakland, California

Whitaker, Emmet K. and Smith Albert J.
Room 2040, 111 Sutter Street
San Francisco, California

Williams, Harry G.
20th and Franklin Streets
Oakland, California

EXHIBIT B [117]

HOLDERS OF FIRST MORTGAGE SIX PER CENT (NET) SINKING FUND THIRTY YEAR GOLD BONDS OF OAKLAND HOTEL COMPANY

Kohler & Chafe
Care, Crocker First National Bank of San Francisco
No. 1 Montgomery Street
San Francisco, California

Williams, Earle
Care, Trust Department
Crocker First National Bank of San Francisco
No. 1 Montgomery Street
San Francisco, California

Wagoner, W. Gatzmer
Livermore, California

Marks, W. B.
2001 P Street
Sacramento, California

Lingg, Henry F.
1884 Capistrano Avenue
Berkeley, California

Johanson, M. F.
Lincoln, California

Bouvier, Mrs. Bessie and Chapman, Margaret
1249 Thirty-third street
Sacramento, California

Baker, Thomas S.
Holly, Elmstead Road West
Byfleet, Surrey, England

Bank of Alameda County
Alvarado, California

Bliss, Walter D.
Room 1008, Balboa Building
San Francisco, California

Booth, Carrie L.
375 Euclid Avenue
Oakland, California

Booth, Elmer, Trustee of last will and test. of Nellie S. Prescott
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Brockway, Anna
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Brown, Mrs. Stewart
San Anselmo, California

Caldwell, Marjorie S.
79 Ledyard Road
R. F. D. 1
Hartford, Connecticut

Carey, Julya T.
Box 321
San Anselmo, California

Carpenter, Fred
San Anselmo, California

Carrigan, Ann Virginia
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Carrigan, Camilla O.
246 West Santa Inez Avenue
San Mateo, California

Carrigan, Camilla O.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Central Bank of Oakland
Trustee under will of Eliza J. Hyde, Deceased
Trust Department, Central Bank of Oakland
14th and Broadway
Oakland, California

Central Bank of Oakland
Trustee for H. K. Jackson
Care, Trust Department, Central Bank
of Oakland
14th and Broadway
Oakland, California

Central Bank of Oakland
Trustee for David Jackson
Care, Trust Department, Central Bank
of Oakland
14th and Broadway
Oakland, California

Central Bank of Oakland
Trustee for Will of John T. Jones, Deceased
Care, Trust Department
Central Bank of Oakland
14th and Broadway
Oakland, California [118]

Central Bank of Oakland
Trustee for Estate of F. G. Moffett, Deceased
Trust Department, Central Bank of Oakland
14th and Broadway
Oakland, California

Central Bank of Oakland
Trustee under will of J. F. Murphy, Deceased
Trust Department
Central Bank of Oakland
14th and Broadway
Oakland, California

Central Bank of Oakland
Central Bank Building
14th and Broadway
Oakland, California

Church, Elizabeth G.
Care, Trust Department
Crocker First National Bank of San Francisco
Post & Montgomery Streets
San Francisco, California

Colhoun, Mrs. Julia
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Crase, William
LeDuc Street
Grass Valley, California

Crellin, T. A.
Central Bank of Oakland
14th and Broadway
Oakland, California

Crocker First National Bank of San Francisco
Post & Montgomery Streets
San Francisco, California

Cushing, Charles S.
Care, Cushing & Cushing
1 Montgomery Street
San Francisco, California

Cushing, O. K.
Care, Cushing & Cushing
1 Montgomery Street
San Francisco, California

Deane, Cornelia A.
Hotel Shaw
Market, McAllister & Jones St.
San Francisco, California

DeGolyer, Annie C.
217 Federal Telegraph Building
12th and Washington Street
Oakland, California

Dexter, Ella B.
1603 Santa Clara Avenue
Alameda, California

Dickerman, Mrs. Margaret H.
Nevada City, California

Dinsmore, Geo. B.
312 California Street

Dolan, Mrs. M. Elis
916 Ventura Avenue
Berkeley, California

Edwards, B. F.
106 Ross Circle
Oakland, California

Faville, Wm. B.
1002 Crocker First National Bank Building
Post & Montgomery Streets
San Francisco, California

First National Trust & Savings Bank of Santa Barbara
Santa Barbara, California

Fisher, Cora M.
660 Post Street
San Francisco, California

Fitzsimmon, Mary
148 Shrader Street
San Francisco, California

Flood, Eugene V.
214 Bank of America Building
12th & Broadway
Oakland, California

Fogarty, Nora T.
609 Sutter Street
San Francisco, California

Gardner, Charles
825-38th Street
Oakland, California [119]

Garthwaite, Mrs. Mary L.
Care, Trust Department
Bank of America
12th & Broadway
Oakland, California

Gatch, Claud
Hotel Oakland
14th & Harrison
Oakland, California

Glasson, Bernice C.
W. Main Street
Grass Valley, California

Gould, Mrs. Anna L.
702 E. 4th Street
Newton, Iowa

Grant, George H.
214 Bank of America Bldg.
12th & Broadway
Oakland, California

Grenfell, William J.
Grass Valley, California

Hagemann, Edwin E.
Livermore, California

Heron, Dudley
Care, Heron & Co.
Russ Building
235 Montgomery Street
San Francisco, California

Hill, Sallie
2245 Larkin Street
San Francisco, California

Hooper & Company
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Horner, Lottie B.
35 Greenbank
Piedmont, California

Huntington, Thos. W.
Anacapri
Isle of Capri, Italy

Hutchison, Mrs. Bessie
Nevada City, California

Johnston, Wm. E.
Nevada City, California

Langhorne, Mrs. Julia
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Langman, Miss Alice M. and Shields, Mrs. Libbie L.
Nevada City, California

Langman, Miss Alice M.
Nevada City, California

Lewis, Azro N.
703 Market Street
San Francisco, California

Lewis, Wilmarth S.
Care, A. N. Lewis
703 Market Street
San Francisco, California

MacNaughton, Edith A.
Hotel Shaw
Market, McAllister & Jones Sts.
San Francisco, California

Malvey, William
2416 Valdes Street
Oakland, California

Mann, John R. C.
Grass Valley, California

Mason, Charles W.
Care, Trust Department
Central Bank of Oakland
14th & Broadway
Oakland, California

Meyerholtz, Miss Mata
211 Keokuk Street
Petaluma, California

Middleton, Jean P.
Care, H. E. Nowell
601 Crocker Building
620 Market Street
San Francisco, California

Mine Workers Protective League
114 School Street
Grass Valley, California

Moffitt, James K.
41 First Street
San Francisco, California

Moffitt, James K.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California [120]

Murphy, Margaret
2725 Nichol Street
Oakland, California

Native Sons & Daughters
Cent. Committee on Homeless Children
955 Phelan Building
760 Market Street
San Francisco, California

Nichols, Grace
7 Laurel Street
San Francisco, California

Palache, Mrs. Eliza M.
Box 322
Carmel, California

Palmanteer, Kate M.
669 Oakland Avenue
Oakland, California

Peterson, Emily
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Phillips, Alfred
Grass Valley, California

Protestant Episcopal Old Ladies Home
2770 Lombard Street
San Francisco, California

Province of the Holy Name
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Quinlan, Eleanor
798 Post Street
San Francisco, California

Richards & Co.
514 Broadway Building
1419 Broadway
Oakland, California

Richardson, Mrs. Eva F.
Holly Oaks
Sausalito, California

Robinson, Annie J.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Sanborne, Henry K.
Box 114
Mt. Herman, California

Scanlan, Mary E.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Schoenfeld, Bella
2500 Steiner Street
San Francisco, California

Schoenfeld, J.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Schoenfeld, Selma
2500 Steiner Street
San Francisco, California

Shea, Laura H.
Care, Trust Department
Crocker First National Bank of San Francisco
Post and Montgomery Streets
San Francisco, California

Soule, E. G.
Hotel Oakland
14th and Harrison Streets
Oakland, California

Southern, Mrs. Emma
Empire Street
Grass Valley, California

Spear, Harry
Nevada City, California

Starr, Geo. W.
Grass Valley, California

Tompkins, Ethel H.
Box 411
San Anselmo, California

Trever, Miss Helen
2436 Oregon Street
Berkeley, California

Wente, Mrs. Barbara
Livermore, California

Wesson, Grace
1460 Balboa Street
Burlingame, California [121]

West, Charles H.
Care, P. O. Box 151
Sunol, California

OTHER CREDITORS

Western Hotels, Inc.
Hotel New Washington
Seattle, Washington

Oakland Hotel Company
Care. Robbins & Van Fleet
Crocker Building
San Francisco, California

Street, E. C.
Trustee in Bankruptcy for Wood Bros. Holding Co.
1212 Broadway
Oakland, California

American Dyeing & Cleaning Works
528 Chestnut Street
Oakland, California

G. Bonora Company
4th and Franklin Streets
Oakland, California

Bruzzone Bros., Inc.
407 - 2nd Street
Oakland, California

Colgate-Palmolive-Peet Co.
Station A
Berkeley, California

Community Chest of Oakland
816 Bank of America Building
1212 Broadway
Oakland, California

Consolidated Oyster Company
123 Van Ness Avenue South
San Francisco, California

Fred W. Diehl, Inc.
324 Franklin Street
Oakland, California

Dodge-Sweeney Company
362 - 4th Street
Oakland, California

Dohrmann Hotel Supply Company
1018 Clay Street
Oakland, California

East Bay Municipal Utility District
512 - 16th Street
Oakland, California

Electric Motor & Machine Works
217 Broadway
Oakland, California

Globe Grain & Milling Co.
1701 Montgomery Street
San Francisco, California

John Hansen & Sons
4th and Clay Streets
Oakland, California

The Irvine Company
381 - 5th Avenue
Oakland, California

A. Levy & J. Zentner Co.
3rd and Franklin Streets
Oakland, California

Los Angeles Soap Company
599 Second Street
San Francisco, California

Mayer & Lange
434 Greenwich Street
New York, New York

Ohio Match Sales Company
Wadsworth, Ohio

Orr, Calvin M.
364 - 2nd Street
Oakland, California

Otis Elevator Co.
23 Stockton Street
San Francisco, California

Pacific Gas & Electric Co.
17th and Clay Streets
Oakland, California

Pacific Telephone & Teleg.
1521 Franklin Street
Oakland, California

A. Paladini, Inc.
520 Washington Street
Oakland, California

Phoenix Plating Works
461 Bush Street
San Francisco, California [122]

Pioneer Beverages, Ltd.
343-10th Street
Oakland, California

P. F. Rathjens & Sons
1331 Pacific Street
San Francisco, California

B. F. Schlesinger & Sons
15th & San Pablo
Oakland, California

J. Seulberger & Company
418-14th Street
Oakland, California

Sperry Flour Co.
8th Ave. and E. 10th Street
Oakland, California

Standard Oil Co. of California
Tapscott Building
1916 Broadway
Oakland, California

Troy Laundry Co.
1812 Dwight Way
Berkeley, California

Central Nat. Bank of Oakland
Joseph H. Grut, Receiver
Central Bank Building
14th and Broadway
Oakland, California

West Coast Soap Co.
26th and Poplar Streets
Oakland, California

Western Paper Box Co.
5th and Adeline Streets
Oakland, California

First National Bank
(Anglo, Calif. Trust Co.)
1560 Broadway
Oakland, California

Zellerbach Paper Co.
609 Franklin Street
Oakland, California

Joseph H. Grut, Receiver
Central National Bank of Oakland
Central Bank Building
14th and Broadway
Oakland, California

Jurgens, W. C.
Hotel Oakland
14th and Harrison Streets
Oakland, California

The Chas. Jurgens Co.
1224 Broadway
Oakland, California

The Chas. Jurgens Co.
1224 Broadway
Oakland, California

The Chas. Jurgens Co.
1224 Broadway
Oakland, California [123]

[Title of Court and Cause.]

AFFIDAVIT OF PUBLICATION

State of California,
City and County of San Francisco—ss.

E. C. LUCHESSA, being first duly sworn, deposes and says:

That he is and at all times hereinafter mentioned was a citizen of the United States, over the age of Twenty-one years and a resident of said City and County; and is and was at and during all said times the principal clerk of The Recorder Printing and Publishing Company, printers and publishers of "THE RECORDER," a newspaper of general circulation printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California; that said "THE RECORDER" is and was at all times herein mentioned, a newspaper of general circulation, as that term is defined by Section 4460 of the Political Code; its status as such newspaper of general circulation having been established, pursuant to Section 4462, Political Code, by a decree of the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, judge, made and entered on the 11th day of October, 1905, which said decree was restored by a judgment given in the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, judge, made and entered on the 2d day of December, 1907, and recorded in Record Book 15 at page 155 thereof; and as provided by said Section 4460, in and at all said times was published for the dissemination of local and telegraphic news and intelligence of a general character, having a bona fide subscription list of

paying subscribers, and is not and never was devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, race or denominations; that at all said times said newspaper had been established, printed and published in said City and County of San Francisco, State of California, at regular intervals for more than one year preceding the first publication of this notice herein mentioned; that said notice was set in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpareil, describing and expressing in general terms the purport and character of the notice intended to be given; that a Notice to Stockholders and Creditors in the above entitled matter, of which the annexed is a true printed copy, was published in said newspaper on the following dates, to-wit: April 19, 20, 22, 23 and 24, 1935; being as often as said newspaper was published during said period; and further deponent sayeth not.

E. C. LUCHESSA

Subscribed and sworn to me before this 24th day of April, 1935.

C. R. HOLTON

[Seal]

Notary Public in and for the City and County of San Francisco, State of California.

Filed May 23, 1935 at 4 p. m.

NOTICE
TO STOCKHOLDERS AND CREDITORS

IN THE DISTRICT COURT OF THE United States for the Northern District of California, Southern Division.

In the Matter of the Application of OAKLAND HOTEL COMPANY, under Section 77B of An Act of Congress of the United States of July 1, 1898, entitled: "An Act to Establish a Uniform System of Bankruptcy Throughout the United States, as Amended June 7, 1934."—No. 25428-K.

Whereas, Oakland Hotel Company has proposed herein a plan of reorganization and has petitioned the Court that it be approved; and

Whereas, the hearing heretofore set for the consideration of said proposed plan, for the consideration of the confirmation of said proposed plan and of a dismissal of said proceedings and of all other matters incidental thereto and for the making of such order or orders in reference thereto as may appear to be appropriate, having been continued pending the filing, evidencing, classification and allowance of claims and interests of creditors and stockholders, to ten o'clock a. m. on the 3rd day of June, 1935;

Now, therefore, notice is hereby given to the creditors and stockholders of the Oakland Hotel Company to file and evidence their claims and interests in this proceeding with the undersigned Special Master at his office at No. 610 Grant Build-

ing, No. 1095 Market Street, in the City and County of San Francisco, State of California, on or before the 31st day of May, 1935.

Creditors' claims may be presented upon any of the usual forms upon which ordinary claims in bankruptcy are proved and evidenced prima facie by the affidavit of the claimant or any authorized agent of the claimant. Interests of stockholders may be evidenced by the affidavit of the stockholder or his agent setting forth the number of shares held by such stockholder and whether the same are preferred or common stock. The authority of an agent may be proved by his own affidavit. The proof must designate whether the creditor is secured or unsecured and if secured, whether secured by a bond indenture and if not, what security he holds, but a creditor need not, unless subsequently requested to do so, present or file the written evidence of indebtedness such as bonds, notes, etc. For the purposes of the plan and its acceptance, creditors of the debtor are divided into two classes, namely, secured and unsecured. Stockholders are divided into two classes, namely, common stockholders and preferred stockholders.

No claim or interest not presented and proved within the time above stated may participate in the plan proposed except on order for cause shown.

Notice is also hereby given that a hearing upon the validity of said claims and interests, when said claims and interests will be allowed or disallowed

shall be held before the undersigned Special Master on said 3rd day of June, 1935, at ten o'clock a. m., at the courtroom of the undersigned, in the Grant Building, No. 1095 Market street, San Francisco, California, and that at said time and place a hearing will be held for the consideration of said proposed plan, for the consideration of the confirmation of said proposed plan and of a dismissal of said proceedings and of all other matters incidental thereto and for the making of such order or orders in reference thereto as may appear to be appropriate.

Dated: April 17, 1935.

W. A. BEASLY,
Special Master.

April 19-5t dly
[124]

[Title of Court and Cause.]

CREDITORS' MEMORANDUM RELATING TO DEBTOR'S OBJECTIONS TO HEARING

The order of reference dated April 3, 1935, recites that the debtor objected to the hearing and consideration of its proposed reorganization plan until after proceedings are taken for the presentation, proof and allowance of claims of creditors, and until it is determined who are creditors and who are stockholders, and until there has been a division of creditors and stockholders into

classes. The order states that it is the contention of the debtor that, until this is done, the creditors and stockholders "could not participate in the hearing upon the plan, and that these requirements were jurisdictional."

The order instructs the special master "to pass upon the merits of the objection of the debtor, through his attorneys, herein set forth; if he determines that said objection is without merit, he may proceed with the hearing upon the plan as herein outlined". If the special master determines that the objection is meritorious, the order directs that he shall then give the required notices and shall pass upon and classify the various creditors. [125]

The debtor's objections, as stated in the order of reference, are as follows:

(1) That until claims are presented approved and classified, the creditors "could not participate in the hearing upon the plan";

(2) "That these requirements were jurisdictional", namely, the requirements for proof of claims and for classification of creditors.

In support of their claim that the objections urged by the debtor are without merit, the answering creditors present the following propositions:

1. The right of creditors to participate is not dependent upon a prior presentation, allowance or classification of their claims;

2. The jurisdiction of the court to consider the proposed plan of reorganization is not dependent

upon any prior presentation, allowance or classification of claims;

3. If the special master has any discretion in the matter, that discretion should be exercised in favor of a decision to proceed with the hearing.

Filed June 6, 1935—3:39 P. M. [126]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER. [127]

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

I respectfully recommend that this proceeding be dismissed for the following reasons:

On October 18, 1934 Oakland Hotel Company filed its petition to be allowed to obtain relief under Section 77-B of the National Bankruptcy Act. The creditors answered the petition on or about the 13th of November, 1934 and moved to dismiss the proceeding. An order was made, upon my recommendation, on or about the 19th day of December, 1934. I recommended that the petition be not dismissed, but that the debtor be given to and including the first day of February, 1935 to propose its plan of reorganization and that the time be not extended, for the reason that the property already had been in the hands of the Bondholders' receiver, appointed by the Superior Court, for a period of almost three years, and that the matter

should be brought to a conclusion, therefore, that the time fixed for the proposal of the plan be made final. This recommendation was approved by the Court and on the 14th day of February, 1935, the debtor proposed and filed its proposed plan of reorganization and certain creditors thereupon filed their opposition to the confirmation of the plan, and on the 26th day of March, 1935, the Court ordered that all matters that came before it on that day be referred to me as special master, to take testimony, ascertain the facts and report such facts with my conclusions and recommendations thereon to the Court; and on the 17th day of April, 1935, after hearing, an order was made by the Court, providing that claims should be filed and entered on or before the 31st day of May, 1935 and dividing the creditors of the debtor into two classes, namely, secured and unsecured creditors, and the stockholders into two classes, namely, common stockholders and preferred stockholders, and fixing the [128] the 3rd day of June, 1935 for a hearing upon the validity of the claims that might be filed and continuing the hearing of the matter generally until ten o'clock a. m. of said third day of June, 1935, to which said order reference is hereby made for further particulars.

Notice of said hearing so set for the 3rd day of June, 1935 was given by publication in the San Francisco Recorder for five (5) days beginning on the 22nd day of April, 1935, and by mailing with said five day period of publication, a copy of

the notice so published, to the creditors and stockholders named on the list theretofore filed by the temporary trustee, at their respective addresses as given in said list.

On said 3rd day of June, 1935, the said matter came on regularly for hearing. Carey Van Fleet, Esq. appeared for the debtor; Charles A. Beardsley, Esq., representing Messrs. Fitzgerald, Abbott & Beardsley, appeared for certain bondholders; and Messrs. Chickering & Gregory appeared for certain bondholders.

Bernard Silverstein, Esq. appeared on behalf of E. C. Street, the trustee in bankruptcy of Wood Bros, a bankrupt, representing a claim for damages growing out of a lease held by Wood Bros., a corporation, of the Oakland Hotel. Mr. Van Fleet, representing the Oakland Hotel Company thereupon stated that the claim would be challenged. The other claims are approved.

There was no objection to any of the other claims on file.

Mr. Beardsley and Mr. Green, appearing on behalf of Messrs. Chickering & Gregory, representing $411,000 face value of bonds out of $660,000 outstanding, stated that the plan of reorganization heretofore proposed would not be accepted by their clients. The plan of reorganization had not been accepted in writing or otherwise by any stockholders, bondholders or creditors of the corporation. [129]

This matter has been before the Court since January, 1932, when suit was brought in the state

court by the bondholders and a receiver appointed for the property. On October 31, 1934, this proceeding was begun and has been continued from time to time. At the first hearing before me, Mr. Jurgens, the President of Oakland Hotel Company, stated that he thought he might be able, if given time, to procure money with which to satisfy the bondholders to an extent that would induce them to approve a plan of reorganization. Upon this slim promise, and with the idea of giving this company every possible opportunity to rehabilitate itself, the matter was continued and has been continued until this date. There seems to me to be no reasonable prospect that sufficient money can be raised to satisfy the bondholders and that owing to the long period of time which has elapsed since the proceedings were first begun, the accummulated interest which has been unpaid and the fact that so far no real progress seems to have been made in securing money with which to effect a reorganization and the fact, which I believe to be true, that new money must be secured if a reorganization is to be effected, I think the proceeding should be dismissed and that the bondholders should be permitted to pursue their remedy in the state court. The state court is entirely competent to foreclose the mortgage in the proceeding now pending before it. To continue the matter in the hands of the Federal Court, it seems to me, would simply result in enlarging the expense already accrued and would result in no benefit to

the debtor. I was advised at the time of the hearing that it would take three or four months to foreclose the mortgage in the state court and thus this additional time would be secured to the debtor by such proceedings, whereas, if liquidated in the bankruptcy court, the sale of the property would be very much more speedy and the debtor would be deprived of time he might have if the matter were returned to the state court, where it [130] originated. Nor will an adjustment between the bondholders and the debtor be prevented by such return of the proceedings to the state court. It is plain that no adjustment can be made in the Federal Court.

I, therefore, recommend that the proceeding be dismissed and the matter relegated to the state court for such further proceedings as it may see fit to take.

Respectfully submitted,
W. A. BEASLY,
Special Master.

Dated: San Francisco, California. June 5, 1935.

[Endorsed] Filed Jun 6, 1935 3:39 P M
WALTER B. MALING, Clerk. [131]

[Title of Court and Cause.]

ORDER ALLOWING EXCEPTIONS TO REPORT OF SPECIAL MASTER AND FIXING DATE OF HEARING.

[132]

IT APPEARING to this court that the Special Master in the above entitled proceeding has filed his report recommending dismissal thereof; and

IT FURTHER APPEARING to the court that the petitioner, OAKLAND HOTEL COMPANY, is entitled to file exceptions to said report; and

IT APPEARING that it will be necessary to review the previous orders of this court and all hearings held herein, together with the full record, in order to frame said exceptions; and IT APPEARING that a plan or plans of reorganization have been submitted which must be passed upon; and

IT APPEARING that proceedings under Section 77-B are new and no rules have been as yet formulated; and

IT APPEARING that a full hearing must be had before this court as to such matter of dismissal in view of the value of the property involved and the importance to the petitioner and the various creditors and stockholders,

IT IS NOW THEREFORE ORDERED that the petitioner shall have twenty (20) days from the date hereof within which to file its exceptions to said report of the Master and thereafter the attorneys for the creditors or any other parties interested may have ten (10) days within which to file reply to such exceptions, and upon the expiration of thirty (30) days said exceptions, reply and report of the Master shall be set for hearing on July 8th, 1935.

IT IS FURTHER ORDERED that in the

meantime all persons interested and entitled thereto shall file with [133] this court their petitions for the allowance of any reasonable compensation for services rendered or reimbursement for actual and necessary expenses incurred in the above proceeding.

Dated: San Francisco, California, June 6, 1935.

HAROLD LOUDERBACK
District Judge.

[Endorsed] Filed Jun 7, 1935 11:12 A. M.
WALTER B. MALING, Clerk. [134]

[Title of Court and Cause.]

EXCEPTIONS TO REPORT OF SPECIAL MASTER FILED JUNE 6, 1935 [135]

These are exceptions to the report of the Master recommending dismissal:

First Exception: In addition to the facts stated in the first page of the Master's report, it will be found that the Master in his former report, dated December 19, 1934, made a finding that the petition was filed in good faith and that there is need for reorganization of the debtor corporation (see page 3, paragraph 3 of Report of December 19, 1934). This report was confirmed by Judge Kerrigan in January, 1935.

Second Exception: A plan of reorganization was proposed by the debtor on February 14, 1935 which has never been heard or acted on by the referee or

court. Counsel for the trustee and creditors have been so concerned with a dismissal of this proceeding and opposition to any reorganization that they have overlooked holding a hearing on the debtor's plan.

Third Exception: No hearing was held on June 3, 1935 upon the proposed plan although ordered to take place after the proper notices were given pursuant to order of April 17, 1935.

See Reporter's Tr., Wednesday April 17, 1935.

Monday, June 3, 1935.

See: 77-B sec. (c) Clause (8)

Fourth Exception:

The Master erred in not holding a hearing on the claim for damages of Wood Bros., growing out of a lease on the Oakland Hotel which he was ordered to do by the order of Judge Sames on the 3rd day of April, 1935, or by the order of April 17, 1935, directing the time for the filing and approval of claims.

Fifth Exception:

The Master erred in stating in his report on page 4 thereof that Mr. Jurgens stated that he thought he [136] might be able if given time to procure money with which to satisfy the bondholders to an extent that would induce them to approve a plan of reorganization.

(See pages 186 et seq., Reporter's Transcript, Tuesday, December 18, 1935).

Sixth Exception:

The Master erred in his interpretation of 77-B of

the Bankruptcy Act that it is necessary to raise money in order to effect a reorganization.

(See page 4 of Master's Report).

Seventh Exception:

The Master erred in ignoring the testimony of June 3rd, 1935 with reference to the recommendations of the local Reconstruction Finance Committee.

Eighth Exception:

The Master erred in not compelling Mr. R. W. Kinney or Mr. A. J. Mount to testify as to whether they would recommend to the bondholders whom they represent to accept $400,000.00 for their bonds (pages 30-38 of the Transcript of June 3, 1935.

Ninth Exception:

The Master erred in imputing the delay since the proceeding began to the debtor. The delay has been occasioned by the opposition of the creditors and the attorney for the Trustee to the proceeding from the very beginning although the petition of the debtor was confirmed at the beginning. At various periods the creditors and attorney for trustee moved to have the proceeding dismissed. They filed a long objection to the proper notices being given to the stockholders and creditors, although it was the duty of trustee and his [137] attorney to carry out the purposes of the act. The attitude of counsel was never conciliatory and constructive but was always attended by an anxiety to have the proceeding dismissed although Mr. Beardsley was also attorney for the trustee who was supposed to re-

present the debtor as well as the creditors.

As was said by the District Court of Indiana in *In Re Wayne Pump Co.*, 9F Supp. 940:

> "The attitude of counsel for the committee after the first brush or two in court was conciliatory and constructive, and, regardless of the motives of the committee, resulted in a compromise reorganization beneficial to the company, and not prejudicial to the rights of the bondholders. The activities of the law firms were of great value to the estate. Bad advice at this point in the proceedings could very easily have resulted in prolonged litigation with possible appeals and unpreventable delays, which would in all probability have destroyed the very purpose of the act and the reorganization proceedings.
>
> "The court is persuaded that counsel, when acting in good faith, should be encouraged to advise and persuade clients whenever possible to assist in, and co-operate with, an honest endeavor to reorganize an industry, and that they should be assured by the courts that such constructive conduct on their part will meet with reward commensurate with the character of the assistance rendered and the results obtained, rather than such counsel will be penalized for shortening, instead of prolonging, the court procedure.

> "On the other hand, the hasty organization of the so-called 'protective committees' who volunteer advice to bondholders and solicit holders of securities not to go along with a company reorganization, suggesting a better method to be proposed and advising the revocation of assents already made, as was done in this case, should, to say the least, be scrutinized carefully by the court when asked to make liberal allowances to the members of such volunteer committee."

Tenth Exception:

The Master erred in not making any findings to which proper objections could be made in a case of this magnitude.

Eleventh Exception: The Master erred in never making any findings as to value of the equity of the Oakland Hotel Company upon which a proper reorganization could be based.

Respectfully submitted,
ROBBINS & VAN FLEET
Attorneys for Debtor.

[Endorsed] Filed Jun 26, 1935 11:37 A. M.
WALTER B. MALING, Clerk. [138]

[Title of Court and Cause.]

ACCOUNT AND REPORT OF TRUSTEE, AND PETITION FOR COMPENSATION

Now comes Henry Barker and represents to the Court that he was appointed temporary trustee herein on October 22, 1934, that he qualified as such trustee on October 23, 1934, and that since that date he has been and now is such trustee;

That pursuant to the order of the court said trustee has operated and managed the hotel business in the hotel in Oakland, California, known as Hotel Oakland, acting throughout the period of his trusteeship as the manager of said hotel devoting his time during reasonable working hours exclusively to said management and to the other duties incident to said trusteeship; that for many years last past said trustee has been and now is engaged in the business as a manager and operator of hotels, and experienced therein and qualified to act as such;

That in January, 1932, the petitioner was appointed the receiver of said hotel by an order of the Superior Court of the State of California in and for the County of Alameda in an action prosecuted by the Trustee under the bond indenture referred to in the debtor's petition, that the petitioner operated said hotel as such receiver until he was appointed temporary trustee as aforesaid, and that therefore his operation of said hotel has been continuous since January, 1932; [139]

That no compensation has been allowed or paid to

the petitioner for his services as such trustee, and that the petitioner believes that a fair and reasonable compensation for the services so rendered and to be rendered by him amounts to the sum of $300.00 per month beginning on the date of his qualification, namely, October 23, 1934, and continuing until his discharge;

That pursuant to the order of the court the petitioner on October 24, 1934, employed Charles A. Beardsley as his attorney under a general retainer, that said attorney has rendered to the petitioner all legal services required by the petitioner, the nature of said services being set forth in the petition of said attorney for compensation filed concurrently herewith, and that the petitioner believes that a fair and reasonable compensation for said legal services amounts to the sum of $500.00, being the amount of compensation for which said attorney is petitioning;

That annexed hereto and marked Exhibit "A" and made a part hereof is a true account of said trustee, as of May 31, 1935, showing the receipt of said trustee from the said receiver of the sum of $12,762.22. showing other receipts from October 23, 1934, to May 31, 1935, inclusive of $252,460.50, making total receipts of $265,222.72; that said account shows disbursements of $255,888.66, and a cash balance of $9,334.06;

That at the time of the trustee's discharge. and sooner if required by the court the trustee will

present a supplemental account or accounts showing his receipts and disbursements since May 21, 1935.

Wherefore, the petitioner prays that his account be allowed and approved and that he be allowed compensation at the rate of $300.00 per month beginning on October 23, 1934, and continuing until his discharge, and that the petitioner be authorized to pay said compensation out of funds in his possession as such trustee; that annexed hereto is petitioner's [140] oath to said account.

HENRY BARKER
Henry Barker, Temporary Trustee

CHARLES A. BEARDSLEY
Attorney for Temporary Trustee,
1515 Central Bank Bldg.,
Oakland, California

State of California,
County of Alameda—ss.

Henry Barker, being first duly sworn, deposes and says: That he is the temporary trustee in the above matter and the petitioner herein; that he has read the foregoing report and petition by him subscribed, and that he knows the contents thereof and that the same is true.

HENRY BARKER

Subscribed and sworn to before me this 28th day of June, 1935.

[Seal] CONSTANCE E. MULVANY

Notary Public in and for the County of Alameda, State of California.

[Endorsed] Filed Jun 28, 1935 2:05 P. M.
WALTER B. MALING, Clerk. [141]

EXHIBIT "A"

ACCOUNT OF TEMPORARY TRUSTEE

The estate of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee

DR.

Cash on Hand and In Bank, Received from Receiver October 23rd, 1934		$12,762.22
RECEIPTS: Oct. 23rd, 1934 to May 31, 1935		
Guest Payments on Accounts	$156,017.46	
Cash Received in Dining Room	53,878.82	
Tavern	35,232.57	
2½% State Sales Tax paid by guests	2,539.45	
Lobby Liquor Store	1,432.55	
Barber Shop	998.90	
Hat Checking Concession	615.25	

Federal Tax on Dance Cover Charges	453.94	
Telephone Cash Receipts	397.76	
Special Refunds from Purveyors	371.86	
Paper, grease, junk and bottles sold	126.37	
Advanced by Purveyor for Purchase of Coffee Urn	125.00	
Fire Loss—paid by Insurance Companies	67.50	
Beverages sold from Storeroom	61.50	
Pay Toilets	43.35	
Accounts Receivable—Barber Shop & Tailor	27.00	
Dues and Subscriptions—refund from N.R.A.	20.61	
Baggage Commission from Express Co.	19.79	
Uniforms paid for by waitresses	11.40	
Tailor work paid by cash	8.75	
Weighing Machine	6.17	
Storeroom Supplies Sold	4.50	252,460.50
		$265,222.72

[142]

ACCOUNT OF TEMPORARY TRUSTEE

The estate of Oakland Hotel Company debtor, in account with Henry Barker, Temporary Trustee.

CR.

DISBURSEMENTS: October 23, 1934 to May 31, 1935.

Amounts paid on Accounts Payable covering Purchases of: Food, Beverages, House Supplies, Engineer bills, Advertising bills, Dues and Subscriptions, Insurance, State Sales Tax, Guests Laundry, Telephone Exchange, Music, New Equipment purchased, Miscellaneous Taxes and Licenses and Sundry Items	$129,404.89	
Less Cash Discount	660.13	$128,744.76
Pay Roll		81,739.70
Cash Items advanced to Guests (& charged to accts)		18,243.30
Ist Instal. 1934-5 Real Estate Taxes—Paid Dec. 1934		14,459.77
2 nd Instal. 1934-5 Real Estate Taxes—Paid April, 1935		12,463.78
Tax on Checks		16.22
Trusteeship Expenses		71.13
Bond of Trustee		100.00
Bond of Receiver		50.00
		255,888.66

Cash on Hand and in Bank,
May 31st, 1935..... 9,334.06

$265,222.72

Filed June 28, 1935—at 2:05 PM.

[143]

[Title of Court and Cause.]

PETITION FOR PAYMENT OF ATTORNEYS' FEES AND FOR REIMBURSEMENT OF ATTORNEYS FOR CREDITORS.

Now come Chickering & Gregory and Fitzgerald, Abbott & Beardsley and represent to the court that they are the attorneys for parties in interest in the above proceeding, namely, for all of the bondholders who have appeared and participated in said proceeding, that they have been the attorneys for said bondholders continuously since the filing of the debtor's original petition herein;

That said bondholders are the owners and holders of bonds issued by the debtor under the terms of the indenture dated January 1, 1910, and referred to in the debtor's petition, that the real property known as Oakland Hotel and personal property used in and incidental to the operation of said hotel is the only property of the debtor, known to petitioners, that is involved in this proceeding;

That in the month of January, 1932, Henry

Barker was appointed as receiver by the Superior Court of the State of California, in and for the County of Alameda, in a suit prosecuted by the trustee under said bond indenture to enforce the right of said trustee to possession of said property by reason of the default of the debtor under said bond indenture, that thereupon said receiver took possession of all of said property [144] and continued in said possession and operated the hotel business incidental to said property continuously until said Henry Barker was appointed temporary trustee herein, that the bondholders under said bond indenture have a first lien on all of said property;

That the value of said property is less than the amount of the claims of the bondholders, that the bondholders are the only parties, other than said receiver, temporary trustee and the trustee under the bond issue, that have any interest in or right to said property or any part thereof, and that the petitioners as such attorneys for the bondholders have rendered valuable legal services for said bondholders in this proceeding, all of which services have been equally valuable to all of the bondholders in proportion to their respective bondholdings;

That there are now outstanding under said bond indenture bonds of the face value of $660,000.00, upon which interest at the rate of 6% per annum since January 1, 1931, is wholly unpaid, that shortly before the appointment of said receiver by the state court the debtor refused longer to operate

said hotel, notified all guests to move, and abandoned said hotel property to the bondholders, that the debtor's management of said hotel prior to said abandonment had been of such a nature as to cause large and rapidly increasing losses, to permit accruing taxes to remain unpaid, and to cause the substantial depreciation of the bondholders' security;

That the management of said hotel by Henry Barker as receiver and as temporary trustee at all times was of such a nature as to protect and to preserve said property for the benefit of the bondholders, and that at all times since the commencement of the proceedings herein it has been of the utmost importance to the bondholders that the possession of said property should not be restored to the debtor and that the bondholders be permitted to continue the receivership proceedings in the state court to the end [145] that the heavy losses already suffered by them should not be substantially increased, and to the end that they be permitted to recover as large a proportion as possible of the principal and interest owing to them by the debtor and secured by said bond indenture;

That, by the proceedings herein, the debtor sought to secure for itself the immediate and continued possession of the said hotel, and, by a purported plan of reorganization, to gain for itself the possession and use of said property, for a long period of years, with the following changes among

others in the rights of the bondholders under said bond indenture: (1) postponement for fifteen years of all provisions for amortization, retirement and redemption of bonds, (2) postponement for fifteen years of the due date of the $660,000.00 past due principal and of the $165,000.00 past due interest, (3) deduction of $214,500.00 from interest to accrue during the next fifteen years, (4) making the payment of any interest whatever during the next five years dependent wholly upon the possibility of the debtor operating the hotel at a profit, and (5) guaranteeing the debtor's possession of the hotel for more than seven years, even though no payment of interest or otherwise were made in the meantime to the bondholders, even though the bondholders' security should be allowed further to depreciate, even though taxes should be allowed to go delinquent, and even though the borrowings by the debtor on the bondholders' security should equal the full value of said security;

That, under the debtor's reorganization plan, nothing of any substantial value was to be given to the bondholders as compensation for all of the valuable rights of the bondholders that the debtor thus sought to take from the bondholders under and by virtue of this proceeding;

That, because of the foregoing facts and circumstances, at all times since the commencement of this proceeding it has [146] been and now is of utmost importance to all of the bondholders that the

interests of the bondholders be adequately represented herein and that, by all legal means, the debtor be prevented from accomplishing its purposes as above set forth;

That, as the attorneys for the bondholders, the petitioners have rendered all legal services necessary and proper thus to protect the interests of the bondholders, which legal services rendered by the petitioners include the following:

(1) Appearance in court on October 20, 1934, at the time of the commencement of said proceedings, at the hearing of the application of the debtor to be placed in immediate possession of said hotel property, at which hearing petitioners resisted said application and were instrumental in securing from the court an order appointing said Henry Barker temporary trustee, thereby making possible the continuous operation of said hotel business;

(2) Preparation and filing of an answer controverting material allegations of the debtor's petition and seeking a dismissal of said petition;

(3) Preparation and filing of a written opposition to the debtor's request for an order setting aside the appointment of the temporary trustee and placing the debtor in possession, and of a detailed affidavit in support of said opposition;

(4) Appearance in court on November 5, 1934, in opposition to debtor's motion to dismiss creditors' answer, and in opposition to debtor's motion to set aside appointment of temporary trustee;

(5) Appearance in court on November 19, 1934, being the time set for hearing to determine whether or not the appointment of the temporary trustee should be made permanent, etc.;

(6) Preparing order referring to Special Master the issues in reference to the application of the debtor to be placed in possession and in reference to the dismissal of the debtor's [147] petition, securing the written consent of attorneys for debtor to said order, and securing the signing of said order;

(7) Trial before the Special Master of issues thus referred, the trial lasting four days, besides preliminary hearing relating to time and nature of proceedings and issues to be determined thereat, and besides informal hearing in reference to the Special Master's report, which hearings were followed by the Special Master's report recommending that the debtor be not restored to possession, and relating to the subsequent presentation by the debtor of a proposed plan of reorganization;

(8) Preparation and securing the signing of order in accordance with the foregoing report of the Special Master;

(9) Three appearances in court for the purpose of securing order referring proposed reorganization plan to Special Master, which reference was opposed by counsel for the debtor;

(10) Several appearances before Special Master for the purpose of securing hearing upon matters so referred;

(11) Several hearings before Special Master in relation to the debtor's proposed reorganization, and in relation to the dismissal of the proceeding, said hearings having begun on April 17, 1935, and having been postponed and then completed on June 3, 1935, in which hearings the petitioners presented law and facts in support of their contention that the proposed reorganization plan should not be approved and that the proceedings should be dismissed, which hearings were followed by the Special Master's report recommending a dismissal of the proceedings;

(12) Preparation for the meeting of the debtor's opposition to the making of an order of dismissal in accordance with said report;

(13) Detailed examination and analysis of the provisions of Section 77-B of the Bankruptcy Act, of current publications relating thereto, of other proceedings pending under said section, [148] of the procedure followed in said proceedings, of reports of Special Masters and of decisions of the Courts in similar proceedings, and the preparation of detailed memoranda in reference thereto;

(14) Detailed investigation of financial statements, financial reports, accounts and other data relating to and indicative of the nature of the debtor's management of Oakland Hotel and the management thereof by Henry Barker as receiver and as temporary trustee and the interviewing of accountants and other persons in reference thereto;

(15) Numerous consultations among attorneys who are members of the petitioners' law firms in reference to the legal questions and in reference to the questions of fact involved in the proceeding;

That the legal services thus rendered by the petitioners for the benefit of the bondholders required substantially more time and substantially more detailed attention because of the fact that (1) the procedure provided for in said Section 77B is new, and there are many uncertainties as to the procedure that should be followed and as to the rights and duties of the various persons and classes of persons interested therein, (2) the attorneys for the debtor have vigorously and insistently supported the purported interests of the debtor in the proceeding, have insistently prosecuted the debtor's claim that it should be restored to the possession of the hotel property, have vigorously opposed the efforts of the petitioners to secure a hearing and ruling upon the sufficiency of the debtor's reorganization plan and have failed to cooperate with petitioners to the end that thedebtor's application and the debtor's proposed plan of reorganization might be considered and disposition thereof made upon the merits thereof;

That, as established by the evidence presented at [149] hearings before the Special Master, the Oakland Hotel property, upon which property the bondholders have a first lien by reason of said bond indenture, and being all of the property involved in

this proceeding, is of the reasonable value of $526,000.00, and that the legal services rendered to the petitioners in this proceeding have been calculated to protect, and have been necessary to protect, the interest of the bondholders in said property and the bondholder's virtual ownership thereof;

Petitioners represent that they have not received or been allowed any compensation for the services thus rendered to the bondholders and that they believe that fair and reasonable compensation for the services so rendered them amounts to the sum of $5,000.00;

Petitioners further represent that as an incident to their representation of the bondholders therein they have actually and necessarily expended money in connection with the proceeding, by reason of which expenditures they are entitled to reimbursement, as follows:

1934

Nov. 13,	Notary's fees: Verification of answer, and of affidavit in opposition to debtor's request to be placed in possession	$ 1.00
Dec. 18,	Court reporter's per diem	12.50
" "	Account fee of Special Master	25.00
" "	Special Master's clerk's fee	12.50
" 19,	Court Reporter's per diem	6.25
" "	Account fee of Special Master	25.00
" "	Special Master's clerk's fee	12.50
" 27,	Court Reporter, ½ cost of transcript	58.50
" "	Court Reporter, copy of transcript	58.50
" "	Court Reporter's per diem	6.25

1935

Jan. 7,	Account fee of Special Master	12.50
Apr. 9,	Court Reporter's per diem	3.15
June 3,	Court Reporter's per diem	3.15
" 7,	Court Reporter, copy of Special Master's report	2.00
" 12,	Court Reporter, copy of transcript	23.40
	Total	$262.20

Wherefore, your petitioners pray that an order be made herein allowing your petitioners the sum of $5,000.00 for legal [150] services rendered by the petitioners to the bondholders herein, and allowing the petitioners reimbursement in the sum of $262.20 for actual and necessary expenses incurred in connection with said representation; that the petitioners have hereto attached affidavits as required by the rules.

Chickering & Gregory,
Fitzgerald, Abbott & Beardsley,
Petitioners.

State of California,
County of Alameda—ss.

Charles A. Beardsley, being first duly sworn, deposes and says: That he is a member of the firm of Fitzgerald, Abbott & Beardsley, which firm jointly with the firm of Chickering & Gregory are the attorneys for the bondholders in the above proceeding, and which firms are the petitioners herein, and that he makes this verification on behalf of the petitioners; that he has read the foregoing petition and knows the contents thereof and that the same is true.

Charles A. Beardsley

Subscribed and sworn to before me this 27th day of June, 1935.

[Seal] Constance E. Mulvany
Notary Public in and for the County of Alameda, State of California. [151]

[Title of Court and Cause.]
State of California,
City and County of San Francisco—ss.

Donald M. Gregory, being first duly sworn on oath, deposes and says: That he is a member of the firm of Chickering & Gregory, which firm, jointly with Fitzgerald, Abbott & Beardsley, are the attorneys for bondholders in the foregoing proceeding; that no agreement has been made directly or indirectly, and that no understanding exists, for a division of fees between the petitioners and the trustee, the debtor, or the attorney or attorneys for any of them, or for any other division of fees other than the division between the petitioning law firms.

Donald M. Gregory

Subscribed and sworn to before me this 28th day of June, 1935.

[Seal] KATHRYN E. STONE.
Notary Public in and for the City and County of San Francisco, State of California. [152]

[Title of Court and Cause.]
State of California,
County of Alameda—ss.

Charles A. Beardsley, being first duly sworn on oath, deposes and says: That he is a member of the firm of Fitzgerald, Abbott & Beardsley, which firm, jointly with Chickering & Gregory, are the attor-

neys for bondholders in the foregoing proceeding; that no agreement has been made directly or indirectly, and that no understanding exists, for a division of fees between the petitioners and the trustee, the debtor, or the attorney or attorneys for any of them, or for any other division of fees other than the division between the petitioning law firms.

Charles A. Beardsley.

Subscribed and sworn to before me this 27th day of June, 1935.

[Seal] CONSTANCE E. MULVANY

Notary Public in and for the County of Alameda, State of California.

[Endorsed] Filed Jun 28, 1935 2:05 PM

WALTER B. MALING,

Clerk. [153]

[Title of Court and Cause.]

ANSWER TO EXCEPTIONS TO REPORT OF SPECIAL MASTER [154]

The undersigned counsel representing more than 60% of the first mortgage bondholders of the debtor, answer the exceptions filed by counsel for the debtor to the report of the Master recommending dismissal as follows:

ANSWERING THE FIRST EXCEPTION.

It is submitted that a finding that the petition of the debtor was filed in good faith and that there is

need for reorganization of the debtor corporation is wholly immaterial in view of the conclusion of the Master that irrespective of such filing in good faith and alleged need for reorganization of the debtor corporation that there is no ground nor possibility under the provisions of Section 77-B of the Bankruptcy Act for such reorganization.

ANSWERING THE SECOND EXCEPTION:

It is denied that the purported plan of reorganization was never heard or acted upon by the Master.

The plan of reorganization and its consideration was continuously before the Master from February 14, 1935 to June 3, 1935 and numerous hearings were had thereon during said period at which hearings it was clearly established that said plan could not be confirmed or approved under the provisions of Section 77-B of the Bankruptcy Act.

At all hearings before the Master, counsel representing more than 60% of the outstanding first mortgage bonds of debtor, appeared and refused to accept the purported plan of reorganization and in consequence its adoption or confirmation by the Master or the Court was impossible.

ANSWERING THE THIRD EXCEPTION:

It is denied that no hearing was held on June 3, 1935 upon the proposed plan. At that hearing counsel representing more than 60% of the outstanding first mortgage bondholders [155] (said bondholders having filed claims pursuant to the order of the Master dated April 17, 1935) formally

declined on behalf of said bondholders to accept said plan. It is submitted that the Master had no authority to take any action upon said plan in view of such refusal. In his connection it is alleged that despite repeated notices to bondholders, creditors and stockholders insisted upon by counsel for the debtor and repeated hearings in this proceeding likewise insisted upon by counsel for the debtor extending over the period from October 23, 1934 to June 3, 1935 no bondholder, stockholders or creditor of the debtor ever appeared in support either of the petition of debtor or of the purported plan of reorganization proposed by the debtor. The only appearance made in relation to the plan (other than that of counsel for the debtor) was made by counsel representing more than 60% of the first mortgage bondholders who strenuously opposed the proceedings and urged their dismissal. At no time did the principal stockholder of debtor owning in the neighborhood of 95% of the stock thereof, appear in support of said petition or said purported plan.

ANSWERING THE FOURTH EXCEPTION:

It is submitted that any consideration of the claims filed on behalf of Wood Bros., an unsecured creditor of the debtor, would have been a futile waste of time in view of the demonstrated impossibility of the approval or confirmation of the purported plan under the provisions of Section 77-B of the Bankruptcy Act.

ANSWERING THE FIFTH EXCEPTION:

It is submitted that the statement of Mr. Jurgens referred to is at the most mere conjecture and is of no importance in view of the conclusions in the Master's report.

ANSWERING THE SIXTH EXCEPTION:

It is submitted that the Master did not err in his [156] interpretation of Section 77-B of the Bankruptcy Act and that the circumstances brought out at the hearing before the Master clearly demonstrated the truth of the Master's comment and made evident the utter futility of any attempt to reorganize the debtor in accordance with the purported plan proposed by the debtor.

ANSWERING THE SEVENTH EXCEPTION:

It is alleged that nowhere in the record of this action is there any showing of any definite or even of any tentative commitment made, either formally or informally, to the Master or to any of the parties to this action by the Reconstruction Finance Corporation with regard to any assistance which it might give toward the reoganization of the debtor.

ANSWERING THE EIGHTH EXCEPTION:

It is submitted that the Master committed no error in refusing to compel the witnesses referred to to testify or to commit themselves on a matter wholly irrelevant to the issue before the Court. In fact, the Master rightly concluded that he had no power to compel such testimony.

ANSWERING THE NINTH EXCEPTION:

The Master in no way erred in his conclusion as to the cause of the delays in this proceeding since the record bears abundant evidence to support his conclusion.

ANSWERING THE TENTH EXCEPTION:

It is submitted that the Master's findings are ample to support the conclusion and recommendation made by him.

ANSWERING THE ELEVENTH EXCEPTION:

The record demonstrates that the Master in no way erred in failing to make a formal finding as to the value of the equity of the property of the debtor, first, because the evidence showed by a great preponderance that there was no equity, and second, because such a finding would have been wholly unnecessary and [157] futile under the provisions of Section 77-B of the Bankruptcy Act.

Respectfully submitted,
FITZGERALD, ABBOTT & BEARDSLEY,
CHICKERING & GREGORY,

Attorneys for in excess of 60% of the first mortgage bondholders of the debtor.

[Endorsed] Filed Jul 3, 1935 12:29 P. M.
WALTER B. MALING, Clerk. [158]

[Title of Court and Cause.]

PETITION FOR PAYMENT OF ATTORNEYS' FEES OF ROBBINS & VAN FLEET, ATTORNEYS FOR DEBTOR AND FOR REIMBURSMENT OF ACTUAL AND NECESSARY EXPENSES INCURRED IN CONNECTION WITH THE PROCEEDING.

[159]

Now come ROBBINS & VAN FLEET, Attorneys at Law, practising in the City and County of San Francisco, and represent to the court that they are and have been during the whole of the above proceeding attorneys for the petitioner, OAKLAND HOTEL COMPANY, debtor herein, and they hereby make application for reasonable compensation and reimbursement of the expenses incurred under subdivision 9, subsection (c) of 77-B of the Bankruptcy Act; they herein set forth that the following necessary expenses have been incurred in connection with this proceeding and plan of reorganization:

1934		
Oct. 18	Filing fees and deposit with Clerk	$130.00
Oct. 31	Mimiographing statement, Greta Page	4.25
Nov. 20	Photostatic copy of tabulation of Oakland Hotel Co., Cossitt Co.	1.74
Nov. 15	Service of subpoena by U. S. Marshall	2.10

Nov. 30	Dec. 17—one-half per diem for two days	12.50
Dec. 27	one-half per diem, original transcript, copy of transcript, typing and preparation of report of Special Master	129.50
Dec. 18	fees, special master	37.50
1935		
Feb. 26	Printing 250 copies Plan of Reorganization of Oakland Hotel Co., Parker Printing Co.	29.21
Apr. 19	Expenditure by order of Reference for notices of filing claim	42.05
May 31	Services of subpoena by U. S. Marshall	2.10
Apr. 17	June 3—One-half per diem, original transcript, one copy official report	29.65
		$ 420.60

In addition, petitioners represent that under said subsection (c) subdivision 9 of 77-B, they are entitled to a reasonable compensation for services rendered the debtor in prosecuting this proceeding and in attempting to protect the equity of the debtor in the hotel properties and in preparing a plan of reorganization and attempting to secure a[160] plan which would be satisfactory to all parties interested. In support thereof they present the following: The immense amount of services per-

formed by the attorneys for the debtor will be found by reading the petition of the attorneys for the creditors herein for reasonable compensation and by the record in this case and the papers on file, which speak for themselves.

In the petition of attorneys for the creditors, on page 6 they state:

> "(2) the attorneys for the debtor have vigorously and insistently supported the purported interests of the debtor in the proceeding, have insistently prosecuted the debtor's claim that it should be restored to the possession of the hotel property."

In addition there have been innumerable conferences between the debtor Hotel Company and the petitioner, attorneys; for nine months petitioner's attorneys have labored and battled for the preservation of the debtor's equity in these properties against the attempts of the attorneys for the creditors continually to have the proceeding dismissed. Petitioners represent that their services have been looking toward the preservation of this equity and a reorganization of the properties contemplated by Section 77-B. The conduct of the petitioners has been constructive to that end, whereas the conduct of the attorneys for the creditors has been destructive. Your petitioners represent that they have been entirely diligent in presenting a plan of reorganization and not only in presenting a plan of reorganization but in working towards the preservation of the debtor's equity by attempting

to interest parties in the reorganization of the Oakland Hotel Company properties and in securing a loan from the Reconstruction Finance Corporation, local branch, in all of which they have met with opposition by the attorneys for the creditors herein although it will [161] appear by the record herein that there is a substantial equity in these properties which should not be sacrificed. They have engaged in numerous arguments and filed numerous briefs in this proceeding continually investigating the authorities of the federal courts as they were promulgated in this new proceeding. They persuaded the referee over the opposition of the creditors' attorneys, a long document which is on file herein, that it was necessary to comply with the notice provided for in the act for the filing and proving of claims. Petitioners represent to this court that they stand upon their record in this case for diligent and substantial service to the Oakland Hotel Company under 77-B and that the evidence of their service is fully of record in this case in the papers and documents, briefs and reporter's transcript. It appears to petitioners, then, that if the attorneys for the creditors are entitled to Five Thousand ($5,000.00) Dollars for opposing every step made in this case towards reorganization of the debtor that they are entitled to the sum of Ten Thousand ($10,000.00) Dollars for prosecuting the proceeding under Section 77-B of the reorganization of this debtor to the present time. That this is provided for the

assistance of the debtor and the reorganization of his properties; that petitioners have been diligent in keeping these objects in view and their endeavors in that regard have been honest in their assurance supported by the record in this case and by their own investigation that the debtor has a substantial equity in these properties; for instance, petitioners have a full record by days of conferences, investigations and preparation of the necessary papers in this case beginning with August 31, 1934, and extending down to the date of this hearing and those services were performed almost weekly during that period. [162]

Petitioners will offer this record in evidence at the proper time.

WHEREFORE, your petitioners pray that an Order be made therein allowing your petitioners the sum of Ten Thousand ($10,000.00) Dollars for legal services rendered by the petitioners, to the debtor herein and allowing petitioners reimbursement in the sum of Four Hundred Twenty and 60/100 ($420.60)Dollars for actual, necessary expenses incurred in said proceeding.

ROBBINS & VAN FLEET,
Petitioners

Dated: July 3, 1935.

[VERIFICATION] Filed Jul 3, 1934; 2:15 PM

[163]

[Title of Court and Cause.]

SUPPLEMENTAL ACCOUNT OF TRUSTEE

Henry Barker, temporary trustee, respectfully presents his supplemental account, attached hereto and marked Exhibit "A," in which is set forth a true statement of his receipts and disbursements for the month of June, 1935, his account for the period beginning with the date of his appointment and ending on May 31, 1935, being now on file herein and set for hearing on July 8, 1935.

Annexed hereto is said trustee's oath to said account.

HENRY BARKER,
Henry Barker, Temporary Trustee.

CHARLES A. BEARDSLEY,
Attorney for Temporary Trustee,
1516 Central Bank Bldg.
Oakland, California.

[Endorsed] Filed Jul. 10, 1935 12:06 P.M.
WALTER B. MALING, Clerk. [164]

EXHIBIT "A"

Supplemental Account of Temporary Trustee
The Estates of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee.

DR.

Cash and in Bank, Close of Business	$ 9, 334.06

RECEIPTS: June 1st, 1935 to June 30th, 1935, inclusive.		
Guest Payments on Account	$19,351.43	
Cash Received in Dining Room	6,108.69	
Tavern	4,226.00	
2½% State Sales Tax paid by guests	253.54	
Lobby Liquor Store	132.95	
Barber Shop	127.95	
Hat Checking Concession	17.99	
Telephone Cash Receipts	48. 09	
Special Refunds from Purveyors	19.31	
Paper, Grease, junk and bottles sold	23.08	
Pay Toilets	4.80	
Accounts Receivable—Barber Shop & Tailor	1.50	
Dues and Subscriptions—Refund from N.R.A.	3.49	
Baggage Commission from Express Co.	1.42	
Uniforms paid for by waitresses	8.00	
Weighing Machine	1.20	
Storeroom Supplies Sold	1.65	$30,364.09
		$39,698.15

[165]

Supplemental Account of Temporary Trustee
The Estates of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee.

CR.

DISBURSEMENTS: June 1st, 1935 to June 30th, 1935, inclusive.

Amounts paid on Accounts Payable covering Purchases of: Food, Beverages, House Supplies, Engineer bills, Advertising bills, Dues and Subscriptions, Insurance, State Sales Tax, Guests Laundry, Telephone Exchange, Music, New Equipment purchased, Miscellaneous Taxes and Licenses and Sundry Items $13,557.73		
Less Cash Discount	60.23	$13,497.50
Pay Roll		11,170.06
Cash Items advanced to Guests (& charged to accounts		3,892.47
Trusteeship Expenses		4.00
Income Tax at source a/c 1931		6.00
		$28,570.03

Cash on Hand and in Bank, June 30th, 1935.....	11,128.12
	$39,698.15

[Verification Attached] [166]

[Title of Court and Cause.]

SECOND

SUPPLEMENTAL ACCOUNT OF TRUSTEE

Henry Barker, temporary trustee, respectfully presents his supplemental account, attached hereto and marked Exhibit "A", in which is set forth a true statement of his receipts and disbursements for the period July 1 to 9, 1935, inclusive, his account for the period beginning with the date of his appointment and ending on May 31, 1935, together with his supplemental account for the month of June, 1935, being now on file herein and set for hearing on July 8, 1935, said hearing being continued until July 10, 1935.

Annexed hereto is said trustees' oath to said account.

HENRY BARKER,
Henry Barker, Temporary Trustee.
CHARLES A. BEARDSLEY,
Attorney for Temporary Trustee,
1516 Central Bank Bldg.,
Oakland, California.

[Endorsed] Filed Jul 10, 1935 12:06 P.M.
WALTER B. MALING, Clerk. [167]

EXHIBIT "A"

Supplemental Account of Temporary Trustee The Estates of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee.

DR.

Cash on Hand and in Bank, Close of Business, June, 30th, 1935		$11,128.12
RECEIPTS: July 1st, 1935 to July 9th, 1935, inclusive		
Guest Payments on Account	$ 6,537.16	
Cash Received in Dining Room	1,485.15	
Tavern	853.30	
3% States Sales Tax paid by guests	68.20	
Lobby Liquor Store	50.44	
Barber Shop	37.65	
Telephone Cash Receipts	25.42	
Special Refunds from Purveyors	13.25	
Pay Toilets	1.70	
Baggage Commission from Express Co.	3.03	
Uniforms paid for by waitresses	4.00	9,079.30
[168]		$20,207.42

Supplemental Account of Temporary Trustee
The Estates of Oakland Hotel Company, debtor,
in account with Henry Barker, Temporary
Trustee.

CR.

DISBURSEMENTS: July 1st, 1935 to July 9th, 1935, inclusive			
Amounts paid on Accounts payable covering Purchase of: Food, Beverages, House Supplies, Engineer bills, Advertising bills, Dues and Subscriptions, Insurance, State Sales Tax, Guests Laundry, Telephone Exchange, Music, New Equipment purchased, Miscellaneous Taxes and Licenses and Sundry Items	$ 2,401.49		
Less Cash Discount	10.22	$ 2,391.27	
Pay Roll		5,363.60	
Cash Items advanced to Guests (& charged to accounts		805.83	
Trusteeship Expenses		19.50	
			$8 ,580.20
Cash on Hand and in Bank, July 9th, 1935			11,627.22
			$20,207.42

[Verification Attached] [169]

[Title of Court and Cause.]

ORDER ALLOWING TEMPORARY TRUSTEE'S ACCOUNT AND ALLOWING TEMPORARY TRUSTEE COMPENSATION.

Henry Barker, as temporary trustee, having filed herein his account covering the period from October 23, 1934 to May 31, 1935, inclusive, together with his petition for compensation, and notice of the hearing of said account and petition having been duly given, and it appearing from said account that said trustee during said period received the sum of $265,222.72, and made payments on account of the estate in the sum of $255,888.66, leaving a balance of cash on hand on May 31, 1935, of $9,334.06, and it further appearing that in the month of June 1935, the said trustee received the additional sum of $30,364.09, and paid out the further the sum of $28,570.03, leaving a balance on hand on June 30, 1935, of $11,128.12, and it further appearing that from July 1, 1935, to July 9, 1935, inclusive, the said trustee received the further sum of $9,079.30, and paid out the further sum of $8,580.20, and that the said trustee now has on hand belonging to said estate the sum of $11,627.22, and it appearing that said account is in all respects true and correct; and further appearing that no compensation has been paid to the trustee for his services as such trustee, now therefore,

It is hereby ordered that said account, including said supplemental account covering the period to and including July [170] 9, 1935, be and it is hereby allowed;

It is hereby ordered that said Henry Barker, as temporary trustee, be and he is hereby allowed compensation at the rate of $300.00 per month from and including October 23, 1934, to the date of the discharge of said trustee or until the further order of the court, said compensation to be paid out of the estate of the debtor in the possession of said temporary trustee.

Dated: San Francisco, California, July 10, 1935.

A. F. ST SURE
District Judge

Approved as to form, as
provided in Rule 22.
ROBBINS & VAN FLEET
Attorneys for Debtor.

Filed July 10, 1935—12:06 PM [171]

[Title of Court and Cause.]

BONDHOLDERS' MEMORANDUM IN OPPOSITION TO PETITION FOR COMPENSATION FILED BY ATTORNEYS FOR DEBTOR.

Acting pursuant to authorization from bondholders owning bonds of the face value of $411,000, out of a total bond issue of $660,000, and in the interest of all of the bondholders, we respectfully submit that the petition for compensation and for reimbursement filed by Messrs. Robbins & Van Fleet, as attorneys for the debtor, should be denied in its entirety.

1. THE ATTORNEYS FOR THE DEBTOR SEEK COMPENSATION AND REIMBURSEMENT OUT OF THE BONDHOLDERS' SECURITY.

While the petition refers to legal services rendered "in attempting to protect the equity of the debtor," the record establishes conclusively that there is no such equity.

The only property of the debtor that is the subject-matter of the proceeding is subject to the lien of the bond indenture. This property was abandoned by the debtor to the bondholders several years before the proceeding was started; and, from January, 1932, to the date of the filing of the debtor's petition, was in the possession of a receiver appointed by the superior court in a suit prosecuted by the trustee under the bond indenture.

This property is subject to a tax lien for taxes that [172] accrued when the debtor was operating the property. The bondholders lien is for the amount of $660,000 principal and $165,000 interest (all interest accruing since January 1, 1931), making a total bondholders claim of $825,000. At the hearings before the Special Master the evidence established that the value of the property did not exceed $627,000. At these hearings it was generally recognized that the security was insufficient to pay the claim of the bondholders, Mr. Jurgens, president of the debtor, having testified that in his opinion the unpaid bondholders' interest was "lost";

the debtor's proposed plan of reorganization refers to the interest accruing since 1931 as being "lost".

It necessarily follows that the petition of the attorneys for the debtor for compensation and reimbursement is a petition that such compensation be paid and such reimbursement be made by the bondholders. Every step taken by the debtor in the proceeding was adverse to the bondholders. The proceeding was prosecuted for the purpose of depriving the bondholders of their security, and for the purpose of using that security for the benefit of the debtor. By the prosecution of the proceeding the attorneys for the debtor have increased the loss already suffered by the bondholders by the amount of the expenses of the trusteeship, and by the amount of the disbursements made by the bondholders' attorneys. Justice would require that the debtor or its attorneys pay the expenses and attorneys' fees of the bondholders, rather than that the bondholders should pay the expenses and attorneys' fees of the debtor.

2. THE AUTHORITIES HOLD THAT THE ATTORNEYS FOR THE DEBTOR CANNOT BE COMPENSATED OUT OF THE CREDITORS' SECURITY.

While property that is subject to a valid lien may be charged in bankruptcy proceedings for costs that directly result [173] from the enforcement of the lien or from the preservation of the property, the law is settled that such property cannot be charged with the compensation of the debtor's attor-

neys or for other general expenses incident to the proceedings.

In the article on bankruptcy in 7 Corpus Juris, Section 782, page 437 (78), the law is stated as follows:

> "Where mortgaged property is operated by the receiver without the procurement of the mortgagee and is sold for less than the mortgage debt, neither the fees nor the costs of administering the general bankruptcy estate nor the expenses of operating the property can be charged against the proceeds to the prejudice of the mortgagee."

In the same section, on page 438 (83), the text reads:

> "Where mortgaged property was by agreement sold by order of the bankruptcy court, neither the attorney for the petitioning creditors who unsuccessfully contested the validity of the mortgage, *nor the attorney for the bankrupt,* is entitled to an allowance of fees from the fund produced which belongs to the mortgage creditors, since they were in no way benefitted by the bankruptcy proceedings."

The following cases, among others, announces and apply the foregoing rule:

In re Goldville Mfg. Co. 123 Fed. 579 (Dist. Court, Dist. of So. Car.);

In re Elmore Cotton Mills 217 Fed. 808 (Dist. Court, S. D. Ala.);

In re Markshoe Co. 289 Fed. 74 (Dist. Court, Dist. of Mass.);

In re Green 23 Fed. (2d) 889 (Dist. Court, W. D. La.);

Robinson v. Dickey 36 Fed. (2d) 147 (Cir. Court of App., 3rd Cir.). [174]

In the case of *In re Goldville Mfg. Co.* supra, page 581, the court bases its decision upon the provision of Section 67(d) of the Bankruptcy Act, providing: "Liens given or accepted in good faith", etc., shall "not be affected by this Act."

3. THE PROCEEDINGS HAVE BEEN PROSECUTED BY THE CHAS. JURGENS CO., AND THAT COMPANY SHOULD PAY ITS OWN ATTORNEYS AND ITS OWN EXPENSES.

As shown by the debtor's original petition (page 1), line 30; page 2, line 29—page 3, line 3), The Chas. Jurgens Co. own approximately 95% of all the stock of the debtor. Attached to that petition is a resolution passed by the board of directors of The Chas. Jurgens Co. on Sepember 24, 1934, directing its president to act through Oakland Hotel Company in the prosecution of this proceeding, which resolution contains various recitals, among others, the following.

> "WHEREAS, The Chas. Jurgens Co.*owns and controls* Oakland Hotel Company".

For all practical purposes, The Chas. Jurgens Co. and Oakland Hotel Company are one corporation, and the indebtedness of Oakland Hotel Com-

pany is the indebtedness of The Chas Jurgens Co. Prior to the summer of 1931, The Chas. Jurgens Co., as set forth in the debtor's petition, provided money for the operation and protection of the bondholders' security. In the summer of 1931, however, The Chas. Jurgens Co. refused to advance further money and caused the security to be abandoned to the bondholders.

The attorneys who are now seeking compensation and reimbursement out of the bondholders already inadequate security have prosecuted the proceeding solely in the interests of The Chas. Jurgens Co., and they should look to The Chas. Jurgens Co. for their compensation and reimbursement. [175]

4. THE PETITION DOES NOT COMPLY WITH THE REQUIREMENTS OF GENERAL ORDERS IN BANKRUPTCY XLII.

Section 1 of General Orders in Bankruptcy XLII provides that:

> "Every attorney . . seeking an allowance of compensation from an estate for services rendered, or reimbursement for expenses incurred in the proceeding, shall file with the court a petition under oath" . . .

It also provides further:

> "And such petition shall be accompanied by an affidavit of the applicant stating that no agreement has been made, directly or indirectly, and that no understanding exists, for a di-

vision of fees between the applicant and the receiver, the trustee, the bankrupt, the debtor, or the attorney for any of them. In the absence of such petition and affidavit no allowance of compensation shall be made" . . .

Since the petition in question does not comply with the requirements of this General Order, in that it is not accompanied by the required affidavit, it is respectfully submitted that it should be denied.

We respectfully submit that the petition should be denied in its entirety.

CHICKERING & GREGORY,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Bondholders.

[Endorsed] Filed Jul 18, 1935 9:39 A. M.
WALTER B. MALING, Clerk. [176]

[Title of Court and Cause.]

DECREE OVERRULING EXCEPTIONS TO SPECIAL MASTER'S REPORT, CONFIRMING THE REPORT, AND DISMISSING THE PROCEEDINGS.

The Special Master to whom reference was duly made having filed herein his report recommending that the proceeding be dismissed and that the matter be relegated to the Superior Court of the State of California, in and for the County of Alameda, and the debtor having presented certain exceptions to said report, and the matter having been argued by counsel;

Thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(1) Each and all of said exceptions are overruled;

(2) Said report of the Special Master is confirmed;

(3) This proceeding instituted by the debtor under the provisions of Section 77B of the Bankruptcy Act is dismissed;

(4) Henry Barker, the temporary trustee appointed herein, is ordered to transfer possession of the debtor's property to said Henry Barker, as receiver appointed by said Superior Court in the proceedings now pending in said Superior Court in which said Henry Barker was appointed receiver, and pursuant to which appointment as such receiver said Henry Barker held possession of said property at the time of his appointment as temporary trustee herein, said transfer to said receiver however to be subject to, and said property in the possession of said receiver shall be subject to, [177] the payment and discharge by said receiver of all obligations incurred by said temporary trustee and of all administrative expenses and allowances in this proceeding;

(5) Upon said transfer of possession of said property to said receiver, said temporary trustee shall take from said receiver a receipt in writing therefor, and shall file said receipt herein, and thereupon said temporary trustee shall be discharged.

Dated: San Francisco, California, July 17, 1935.

A. F. ST. SURE
District Judge.

Approved as to form, as provided in Rule 22.

.....

Attorneys for Debtor.

[Endorsed] Filed Jul 18, 1935 9:39 A.M.
WALTER B. MALING, Clerk [178]

[Title of Court and Cause.]

ORDER ALLOWING COMPENSATION AND REIMBURSEMENT FOR EXPENSES OF ATTORNEYS FOR BONDHOLDERS

Chickering & Gregory, and Fitzgerald, Abbott & Beardsley, the attorneys for the bondholders interested in the proceedings, having filed herein their petition for compensation and for reimbursement for actual and necessary expenses incurred in connection with the proceeding, and notice of the hearing of said petition having been duly given, and it appearing that said attorneys have actually and necessarily incurred expense herein in the sum of $262.20, and that the reasonable value of the said services rendered by said attorneys is the sum of $5000.00;

It is hereby ordered that said Chickering & Gregory, and Fitzgerald, Abbott & Beardsley, be allowed reimbursement for actual and necessary expenses herein in the sum of $262.20, and that they be al-

lowed compensation for said services in the sum of $5000.00, said sums to be paid by the temporary trustee out of the estate of the debtor in the possession of said temporary trustee.

Dated: San Francisco, California, July 17, 1935.

A. F. ST. SURE
District Judge

Approved as to form, as provided in Rule 22.

.....
Attorneys for Debtor.

[Endorsed] Filed Jul 18, 1935 9:39 A.M.
WALTER B. MALING, Clerk [179]

[Title of Court and Cause.]

ORDER

ORDERED that the petition for payment of attorney's fees of Robbins & Van Fleet, attorneys for Debtor, and for reimbursement of actual and necessary expenses incurred in connection with the proceeding, be and the same is hereby DENIED.

Dated: July 18, 1935.

A. F. ST. SURE
United States District Judge.

[Endorsed] Filed Jul 18, 1935 3:25 P.M.
WALTER B. MALING, Clerk [180]

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that all proceedings in the above entitled matter pursuant to Order of Dismissal and including the allowance and disallowance of attorneys' fees and costs and disbursements be stayed pending application for appeal herein for the period of ten (10) days.

Dated: July 19, 1935.

A. F. ST. SURE
United States District Judge.

[Endorsed] Filed Jul 19, 1935 10:33 A.M.
WALTER B. MALING, Clerk [181]

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that all proceedings in the above entitled matter pursuant to Order of Dismissal and including the allowance and disallowance of attorneys' fees and costs and disbursements be stayed pending application for appeal herein for the period of ten (10) days.

Dated: July 29, 1935.

A. F. ST SURE
United States District Judge.

[Endorsed] Filed Jul 29, 1935 10:19 A.M.
WALTER B. MALING, Clerk [182]

[Title of Court and Cause.]

PETITION FOR REHEARING AND MOTION TO RECOMMIT TO SPECIAL MASTER.

[183]

Now comes the OAKLAND HOTEL COMPANY, Debtor Petitioner in the above entitled case and petitions the Honorable District Court for a rehearing of the Decree entered on the 18th day of July, 1935, herein, overruling Exceptions to Special Master's Report confirming the report and dismissing the proceeding and Orders entered on the same date allowing compensation and expenses to attorneys for creditors herein and denying petition for payment of attorney's fees and reimbursement of actual and necessary expenses incurred by attorneys for debtor.

The grounds for the petition for rehearing are as follows:

(1) A recapitulation of the Second, Third, Tenth and Eleventh exceptions to the Master's Report;

(2) That the Master's Report does not contain any Findings or Conclusions of Law so as to properly present the evidence and his Findings thereon to a court of equity under Equity Rule 66 and Local Rule 46;

(3) No opportunity was given petitioner herein in accordance with Local Rule 46 to present any objections to the Findings of the Master or ask for special findings;

(4) That no finding of the value of the proper-

ty of Oakland Hotel Company was made upon which the plan of re-organization could be based and no finding was made of any kind upon the plan presented whether the same was feasible, fair or equitable;

(5) That no hearing was held upon the plan as required by the Orders of April 3, 1935, continued by the Order of April 17, 1935, requiring the Master to take testimony to ascertain the facts and report such facts with his Conclusions of Law to the court; [184]

(6) That the parties and Master herein have mistakenly proceeded upon the theory that Equity Rule 66 and Local Rule 46 did not apply to this proceeding, although under decisions in this circuit and under the bankruptcy rule Equity Rule 66 is applicable, also new Bankruptcy Rule 12, as amended April 17, 1933, and subdivision 11 of subsection (c) of Section 77-B of the Bankruptcy Act; also Bankruptcy Rule 37.

(7) That the court erred in allowing attorneys fees for the creditors' attorneys and expenses, and disallowing any reimbursement for expenses and attorneys' fees to the debtor and his attorneys under the express provisions of subdivision 9 of subsection (c) of Section 77-B of the Bankruptcy Act.

(8) That the above entitled court had made no findings of fact and conclusions of law in this case as required by Equity Rule 70 1/2. In fact, he could not do so, because there were no findings of fact and conclusions of law submitted by the Referee.

This petition for rehearing is made in good faith after a careful examination of the equity rules and counsel consider it meritorious and it is not interposed for the purposes of delay but to prevent delay by clarifying the issues on appeal.

WHEREFORE, petitioner asks that the Orders and Decree heretofore entered be set aside and the matter be reheard and that the court recommit proceeding to the Referee to hold a hearing on the proposed plan and make adequate findings of law and fact.

Respectfully submitted,
ROBBINS & VAN FLEET,
Attorneys for Petitioner [185]

STATEMENT OF LAW AND AUTHORITIES

This is a proper case for a petition for rehearing.

In re Schulz, 2 Fed. Supp. 364;
Mitchell v. Maurer, C.C.A. 9th Circuit,
67 Fed (2d) 286;

Equity Rule 66 and Local Rule 46 apply to this proceeding.

In re Pierce, 210 Fed. Rep. 389;

The reasoning and rule of this case is as applicable to the case today as it was at the time it was decided by Judge Neterer of this circuit.

We have been proceeding so far in these matters under Bankruptcy Rule 27 Local Rule 7 under which a petition for review was put on the calendar on the following Law and Motion day after it was filed. Obviously Rule 27 does not apply for this is

not an order of the referee but a report of a Special Master. Therefore, the rules which apply are Equity Rule 66 and Local Rule 46. Obviously, also, to apply these rules there must be some findings of fact and conclusions of law by the referee and not a mere sketchy recommendation as was made in this case. We have a right to object that there are no findings made by the referee.

See two cases:

In re Highland Silk Company, 41 Fed. (2d) 404, 405.

This is our first opportunity to point out to the court the absence of findings and the special findings that we wish on the value of the plant and as to whether the plan of reorganization equitably and fairly provides protection for the creditors.

Savage v. Monarch Royalty Corporation, 64 Fed. (2d) 650; [186]

Decker v. Smith, 225 Fed. Rep. 776-777;

Cornwall v. Skinner, 62 Fed. (2d) 432;

In disallowing any compensation to the debtor for his attorneys or expenses incurred the court puts a premium upon opposition to any plan of reorganization in these proceedings by the bondholders and makes it prohibitive for the debtor to take advantage of this act although he has a legitimate case and holds in effect that opposition to proceedings under this act are to be encouraged and paid for as against all attempts at reorganization contrary to the holding in a case already cited in this court.

In re Wayne Pump Co., 9 Fed. Supp. 940.

This remedial proceeding has been turned into an adversary proceeding by the attorneys for the creditors. In fact, they maintain that it is so. In such a case we are entitled to findings of fact and conclusions of law by this court under Equity Rule 70 1/2.

Respectfully submitted,
ROBBINS & VAN FLEET
Attorneys for Petitioner.

(Receipt of Copy)

[Endorsed] Filed Aug. 6, 1935 12:19 P.M.
WALTER B. MALING, Clerk. [187]

[Title of Court and Cause.]

REPLY TO DEBTOR'S PETITION FOR REHEARING AND TO MOTION TO RECOMMIT TO SPECIAL MASTER [188]

The several bondholders that have appeared in this proceeding and their attorneys, Chickering & Gregory and Fitzgerald, Abbott & Beardsley, respectfully present this their reply to the debtor's petition for a rehearing and motion to recommit to the Special Master.

It is respectfully submitted that said petition and motion should be denied for each of the reasons herein set forth.

1. ABSENCE OF SPECIAL FINDINGS BY MASTER.

Local Rule 46 provides that the Special Master's report "may be in the form of an opinion." The report was made in this form as permitted by this rule.

This rule provides for special findings only "if requested by either party." Since the debtor did not request the Special Master to make any finding, it cannot now be heard to complain of the absence of such findings.

Furthermore, none of the findings that the debtor claims the Special Master should have made could have aided the debtor.

2. FAILURE OF SPECIAL MASTER TO SUBMIT PROPOSED DRAFT OF REPORT.

The debtor cannot properly be heard at this late date to complain that it did not see a copy of the report before it was filed.

If the debtor desired to make such a complaint, it should have made it when the report was filed. Instead of then complaining, counsel for the debtor, as soon as the report was filed, prepared and caused to be signed and filed an order, giving it time within which to file exceptions thereto, and setting the whole matter for hearing before the court.

Not only did the debtor thus waive its right, if any, to complain because it had not been provided with a draft of the [189] proposed report, but it waived it again twenty days later when it filed its

exceptions to the report as filed, without making any point of the fact that it had not received such draft, and it waived it again, when counsel argued the matter in court and consented to its submission for decision without making any such complaint.

3. ALLEGED MISTAKE IN PROCEDURE.

The debtor complains, because it says that the parties and the Master have "mistakenly proceeded upon the theory that Equity Rule 66 and Local Rule 46 did not apply to this proceeding".

If this were true, the debtor could not be heard to complain. The debtor not only consented to the procedure as followed; it initiated the procedure when its counsel, without consultation with opposing counsel, prepared and caused to be signed and filed the order specifically outlining and prescribing the procedure of which it now complains.

Furthermore, the record does not support the debtor's claim that the procedure followed did not comply with the foregoing rules.

Equity Rule 66 merely provides that a party shall have twenty days to file exceptions after the Master's report is filed. The order thus secured by counsel for the debtor expressly gave the debtor the twenty days.

Local Rule 46 likewise provides for twenty days within which to file exceptions. And the report and the proceedings all complied with this rule.

Therefore, if it is true that the debtor's counsel secured the order prescribing the procedure under the mistaken belief that these rules did not apply,

the matter is of no consequence, since the procedure complied with these rules. [190]

Therefore, there was no mistake in the procedure; and, if there were any such mistake, it was debtor's own mistake, of which it cannot properly be allowed to take advantage.

4. ALLEGED ABSENCE OF HEARING ON REORGANIZATION PLAN.

As pointed out upon oral argument, the debtor's claim that there has been no hearing on its proposed reorganization plan is without support in the record, and is contrary to the undisputed record.

The only thing lacking in the hearing was the absence of any showing in favor of the proposed plan. Even the debtor did not pretend that the plan presented was worthy of favorable consideration, or that it could possibly be approved. Instead, the debtor contented itself with efforts to secure further delay.

The hearing was full and complete. The plan was expressly rejected by a large majority of the bondholders; and it was not accepted or approved by any creditor, either secured or unsecured, or by any stockholder, either common or preferred.

The debtor's present attempt to secure a rehearing, and to secure an order recommitting the matter to the Special Master, is apparently simply another attempt further to delay its creditors, without any pretense of any bona fide showing that a reorganization is even remotely possible, or that it is entitled to any relief.

5. FAILURE OF COURT TO MAKE FINDINGS.

The debtor claims that the Court should have filed special findings and conclusions of law, citing Equity Rule 70 1/2.

Equity Rule 70 1-2 refers to "deciding suits in equity". It is respectfully submitted that neither the order of dismissal nor the order allowing compensation to the creditor's attorneys, nor the order denying compensation to the debtor's attorneys, [191] constituted a decision of a suit in equity, within the meaning of the foregoing rule. It is respectfully submitted further that this rule does not apply to orders or decrees based upon reports of Special Masters, which reports when confirmed take the place of findings and conclusions.

Respectfully submitted,
CHICKERING & GREGORY,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Creditors.

Receipt of copy of foregoing admitted August 7th, 1935.

ROBBINS AND VAN FLEET
Attorneys for Debtor.

[Endorsed] Filed Aug 7, 1935 3:49 P.M.
WALTER B. MALING, Clerk. [192]

[Title of Court and Cause.]

ORDER

ORDERED:

1. That the "Petition for Rehearing and Motion to Recommit to Special Master" be, and the same is hereby DENIED.

2. That the renewed application for payment of attorneys' fees and reimbursement of expenses incurred by attorneys for the Debtor be, and the same is hereby DENIED.

Dated: August 21, 1935.

A. F. ST. SURE
United States District Judge.

[Endorsed] Filed Aug 21, 1935 1:41 P.M.
WALTER B. MALING, Clerk. [193]

[Title of Court and Cause.]

THIRD SUPPLEMENTAL ACCOUNT OF TRUSTEE

Henry Barker, temporary trustee, respectfully presents his supplemental account, attached hereto and marked Exhibit "A", in which is set forth a true statement of his receipts and disbursements for the period from July 10, 1935, to the close of business immediately preceding the date hereof, both days inclusive.

Annexed hereto is said trustee's oath to said account.

Dated, August 23, 1935.

HENRY BARKER,
HENRY BARKER,
Temporary Trustee.

CHARLES A. BEARDSLEY,
Attorney for Temporary Trustee,
1516 Central Bank Bldg.
Oakland, California. [194]

EXHIBIT "A"

Third Supplemental Account of Temporary Trustee

The estate of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee

DR.

Cash on Hand and in Bank, Close of Business, July 9, 1935		$11,627.22
RECEIPTS: July 10, 1935 to August 22, 1935, inclusive		
Guests payments on Account	$23,728.68	
Cash Received in Dining Room	8,436.00	
Tavern	5,440.00	
3% State Sales Tax paid by guests	456.44	
Lobby Liquor Store	191.24	
Barber Shop	180.45	
Telephone Cash Receipts	76.04	
Special Refunds from Purveyors	40.55	

Pay Toilets	6.30	
Sundry Sales of waste paper, grease	24.22	
Uniforms sold	7.00	
Tailor Shop Cash Work	.75	
Hat Checking Concession	20.02	
Baggage Commission	8.73	
Weighing Machine	2.05	
a/c Barber Shop Fixtures	5.00	
Telegraph Commissions	8.29	38,631.76
[195]		$50,258.98

Third Supplemental Account of Temporary Trustee

The estate of Oakland Hotel Company, debtor, in account with Henry Barker, Temporary Trustee.

CR.

DISBURSEMENTS: July 10, 1935 to Aug. 22, 1935 inclusive

Amounts paid on Accounts Payable covering Purchases of: Food, Beverages, House Supplies, Engineer bills, Advertising bills, Dues and Subscriptions, Insurance, State Sales Tax, Guests Laundry, Telephone Exchange, Music, New

Equipment purchased, Miscellaneous Taxes and Licenses and Sundry Items $18, 088.51		
Less Cash Discount	78.21	$18,010.30
Pay Roll		16,402.59
Cash Items advanced to Guests (& charged to accounts		3,332.82
Trusteeship Attorney		500.00
Trusteeship Expenses		3.03
Temporary Trustee's Salary --October 23, 1934 to August 15, 1935, inclusive.....		2,937.10 $41,185.84
Cash on Hand and in Bank Close of Business August 22, 1935		$ 9,073.14
[Verification]		$50,258.98

Filed August 23, 1935-10:07 A.M. [196]

[Title of Court and Cause.]

ORDER DISCHARGING TEMPORARY TRUSTEE

The account of Henry Barker, as temporary trustee, covering the period from October 23, 1934, to July 9, 1935, inclusive, having been filed here in and allowed, and a decree having been rendered herein dismissing the proceedings, and the debtor's motion

for a rehearing having been denied, and said temporary trustee having presented a supplemental account covering the period from July 10, 1935, to the close of business on the day immediately preceding the date of this order, both days inclusive, from which it appears that during said period subsequent to July 9, 1935, said temporary trustee has received the additional sum of $38, 631.76, and has paid out the further sum of $4,185.84, leaving a balance on hand of $9,073.14; and said Henry Barker, as temporary trustee, having filed herein a receipt bearing the same date as this order from said Henry Barker, as receiver, appointed by the Superior Court of the State of California, in and for the County of Alameda, of all property of the debtor that on the date of said receipt was in the possession of said temporary trustee;

It is hereby ordered that said temporary trustee be and he is hereby discharged.

Dated, San Francisco, California, August 23, 1935.

A. F. ST. SURE
District Judge.

[Endorsed] Filed Aug 23, 1935 10:07 A.M.
WALTER B. MALING, Clerk. [197]

[Title of Court and Cause.]

RECEIVER'S RECEIPT

Henry Barker, as receiver appointed by the Superior Court of the State of California in and for

the County of Alameda, acknowledges receipt from said Henry Barker as temporary trustee herein of all property of the debtor that on the date hereof was in the possession of said temporary trustee, subject to the payment and discharge by said receiver of all obligations incurred by said temporary trustee and of all administrative expenses and allowances in this proceeding.

Dated August 23, 1935.

HENRY BARKER,
HENRY BARKER,
as such Receiver.

[Endorsed] Filed Aug 23, 1935 10:07 A.M.
WALTER B. MALING, Clerk. [198]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR [199]

Now comes OAKLAND HOTEL COMPANY, and in support of its appeal from the decree of the above-entitled court on the 18th day of July, 1935, which became final on the 21st day of August, 1935, and which overruled exceptions to the master's report dismissed the entire proceedings allowed compensation and expenses to attorneys for bondholders and denied any compensation or expenses to attorneys for debtor, Oakland Hotel Company, and assigns as error which render said decree incorrect and unjust, and which have been duly excepted to on the various hearings, the following:

1. The court erred in overruling each and all of the exceptions to the master's report of June 8, 1935, upon the grounds stated in said exceptions which are hereby referred to and made a part hereof.

2. The court erred in confirming the said master's report of June 6, 1935, upon the grounds set out in said exceptions.

3. The court erred in confirming the master's report after it was pointed out to him in argument and in the petition for rehearing that the master did not apply to his report the equity rules applicable thereto and did not comply with local rule 46 and did not make any findings of fact or conclusions of law as he was required to do in an equity case.

4. The above court erred in not making findings of fact and conclusions in his decree or in not recommitting the master's report for that purpose as required on argument and in the petition for rehearing contrary to Equity Rule 70 1/2.

5. That in argument on the report of the Master of June 6, 1935, and in the petition for rehearing appellant requests special findings of fact as to the value of the hotel property and the equitableness of the reorganization plan [200] submitted which was ignored by the above-entitled court.

6. That the court erred in denying the petition for rehearing upon all the grounds stated therein which are hereby referred to and made a part hereof.

7. That the court erred in dismissing the above proceedings for the reason that no hearing was had on the proposed plan after the proper notices were sent to creditors and stockholders and the claims and interests were allowed and the creditors and stockholders were properly in court.

8. That the Master's report of June 6, 1935, is not a report of any kind in an equity case but simply a recommendation of dismissal which does not support the decree.

9. That the court erred in not applying local Rule 46 and Equity Rule 70 1/2 to these proceedings.

10. That the Master after recommending a reorganization of the Oakland Hotel Company in the report of December 19th, 1934, held no further hearings to determine the value of the hotel property or the adequacy of the plan proposed but dismissed the proceedings.

11. That the Master and the Court erred in ignoring the proceedings before the Reconstruction Finance Corporation.

12. That the court erred in denying any attorney's' fees or reimbursement of expenses to the attorneys for the Oakland Hotel Company, Appellant, contrary to paragraph 9 of subsection C of Section 77B of the Bankruptcy Act, although the attorneys spent a year attempting to carry out the purpose of Congress in this reorganization and expended five hundred ($500.00) dollars in so doing.

13. That the court in allowing attorneys for the

creditors generous fees and expenses, although their time was spent in opposing every step taken under the act and opposing any [201] reorganization and during this time some of the attorneys were acting for the trustee who was supposed to represent the the debtor as well as the creditors.

14. That the court erred in its order of August 23rd, 1935, discharging the trustee and transferring the property to the state court for the reason that the ten days stay, (28 U.S.C.A. 874) was in force and effect.

15. That the court erred in overruling the objection that no opportunity was given appellant herein in accordance with local Rule 46 to present any objections to a draft report of the Findings of the Master or ask for Special Findings.

16. That no hearing was held upon the plan of reorganization as required by the orders of April 3, 1935, and April 17th, 1935, requiring the Master to take testimony to ascertain the facts and report such facts with his conclusions to the court.

Dated this 18th day of September, 1935.

OAKLAND HOTEL COMPANY

By W. C. Jurgens, Petitioner.

ROBBINS & VAN FLEET

Attorneys for Petitioner.

[Endorsed] Filed Sep 13, 1935 3:40 P.M.

WALTER B. MALING, Clerk. [202]

[Title of Court and Cause.]

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT [203]

TO The Honorable Judges of the above entitled court:

Your petitioner, OAKLAND HOTEL COMPANY, considering themselves aggrieved by the decree entered, signed and filed on the 18th day of July, 1935, which decree did not become final until the 21st day of August, 1935, by reason of a petition for rehearing which petition was denied on that date and which decree overruled exceptions to special master's report, confirmed said report and dismissed the above entitled proceedings, also denied any compensation or reimbursment for expenses of attorneys for debtor, also allowed compensation and reimbursement for expenses of attorneys for bondholders, under section 77B of the Bankruptcy Act, do hereby petition for an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit and pray that an appeal may be allowed and that a citation may be granted directed to the bondholders who obtained said decree, commanding them and each of them to appear before the United States Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises and that a transcript of the record and evidence in the proceedings duly authenticated may be transmitted to said United States

Circuit Court for the Ninth Circuit, and petitioner further prays that the proper order be made fixing the amount of the bond on said appeal.

OAKLAND HOTEL COMPANY,
By W. C. Jurgens, President, Petitioner.

ROBBINS & VAN FLEET
Attorneys for Petitioner. [204]

ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed as prayed for. The cost bond on appeal is fixed at $250.00.

Dated at San Francisco, California, in said Northern District, this 18th day of September, 1935.

A. F. ST. SURE
District Judge.

[Endorsed] Filed Sep 18, 1935 3:40 P.M.
WALTER B. MALING, Clerk. [205]

BOND [206]

[Title of Court and Cause.]
Premium charged for this bond is the sum of $10.00
Bond No. 1295220

KNOW ALL MEN BY THESE PRESENTS:

That the Fidelity and Casualty Company of New York a New York Corporation, with its principal office in the City of New York, and authorized to do a general surety business in the State of Cali-

fornia, and under the laws of the United States as surety on behalf of Oakland Hotel Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, is held and firmly bound unto CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF Oakland, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDWARD A. SOULE, and JAMES A. WAINWRIGHT, Bondholders in the sum of Two Hundred and Fifty ($250.00) Dollars, for the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents;

WHEREAS, an order was entered in the above-entitled proceeding on the 18th day of September, 1935, allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a decree made by said United States District Court on the 18th day of July, 1935, which decree became final on the 21st day of August, 1935, dismissing the above proceedings, disallowing attorneys' fees and expenses to the attorneys for the Oakland Hotel Company, appellant herein, and allowing attorneys' fees and expenses to attorneys for the Bondholders; and WHEREAS, in said order allowing said appeal it was required that appellant give a cost bond on appeal in the sum of Two Hundred and Fifty Dollars,

NOW, THEREFORE, the condition of this obligation is such that if said Oakland Hotel Company shall prosecute its appeal to effect and answer all costs if they fail to make such appeal good, then this obligation shall be void otherwise the same shall be and remain in full force and effect and

In case of a breach of any condition thereof, this [207] court may upon notice to said obligor upon notice of not less than ten days proceed summarily in the above-entitled proceeding to ascertain the amount which said obligor is bound to pay not to exceed Two Hundred and Fifty ($250.00) Dollars, and render judgment and award execution therefor.

IN WITNESS WHEREOF, said The Fidelity and Casualty Company of New York has caused these presents to be executed by their officers or agents thereunto duly authorized this 18th day of September, 1935.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK (Seal)
By L. F. Callahan, Attorney

Approved, September 19, 1935.
A. F. ST. SURE (Acknowledgement
U. S. District Judge of Surety)
Filed September 19, 1935, at 12:17 PM [208]

[Title of Court and Cause.]

STIPULATION AS TO CONSOLIDATION OF APPEALS AND FORWARDING ORIGINAL EXHIBITS [209]

STIPULATION AS TO CONSOLIDATION OF APPEALS AND FORWARDING ORIGINAL EXHIBITS

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the appeal in said action allowed and granted by the above entitled court on the 10th day of September, 1935, may be consolidated for hearing before the Circuit Court of Appeals of the Ninth Circuit with the appeal allowed by said Circuit Court of Appeals on the 21st day of October, 1935, No. 7986 and the Record and Statement of Evidence and Exhibits may be used in both appeals.

IT IS FURTHER STIPULATED that the original exhibits admitted into evidence, being Debtor's Exhibits, Nos. 1 to 21, inclusive, and Creditors' Exhibits, Nos. 1 to 10, inclusive, shall be forwarded to the Circuit Court of Appeals of the Ninth Circuit to be used in the Appeal as directed by that court and the Judge of the above entitled Court may so order.

Dated: January 9th, 1936.

ROBBINS & VAN FLEET

Attorneys for Appellant

FITZGERALD, ABBOTT & BEARDSLEY, CHICKERING & GREGORY

Attorneys for Appellees

SO ORDERED

A. F. ST. SURE

U. S. District Judge

Filed Jan 11 1936- 11:57 AM [210]

[Title of Court and Cause.]

STIPULATION AS TO CONSOLIDATION OF APPEALS AND FORWARDING ORIGINAL EXHIBITS

IT IS HEREBY STIPULATED by and between the parties to the above entitled action that the appeal in said action allowed and granted by the above entitled court on the 10th day of September, 1935, may be consolidated for hearing before the Circuit Court of Appeals of the Ninth Circuit with the appeal allowed by said Circuit Court of Appeals on the 21st day of October, 1935, No. 7986 and the Record and Statement of Evidence and Exhibit may be used in both appeals.

IT IS FURTHER STIPULATED that the original exhibits admitted into evidence, being Debtor's Exhibits, Nos. 1 to 21, inclusive, and Creditors' Exhibits, Nos. 1 to 10, inclusive, shall be forwarded to the Circuit Court of Appeals of the Ninth Circuit to be used in the Appeal as directed by that court and the Judge of the above entitled Court may so order.

Dated: January 9th, 1936.

ROBBINS & VAN FLEET,
Attorneys for Appellant.

FITGZERALD, ABBOTT & BEARDSLEY,
CHICKERING & GREGORY,
Attorneys for Appellees.

So Ordered.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed] Filed Jan 11, 1936, 11:57 A. M.
WALTER B. MALING,
Clerk. [211]

[Printer's Note: Transcript, portion beginning with line 1, page 213 and ending with line 7, page 222, designated by Appellant to be printed.]

MR. BEARDSLEY: May I make this suggestion before we have any formal motions or arguments upon them: That we have some discussion as to what issues are before the Master for determination and what is to be decided.

THE MASTER: I would be very glad to hear that, because the order seems somewhat indefinite.

MR. BEARDSLEY: The question was discussed when we were here in your Honor's chambers a couple of days ago, that there would be a dismissal of the answer and that would be the matter first to be determined. Frankly, the effect of it did not occur to me at that time, but since then I discussed the matter with associate counsel. It has developed, according to our viewpoint that no such matter is before your Honor for consideration at this time. While we are perfectly willing to discuss the issues involved and the legal effect of those issues, the order of reference to the Special Master is to determine issues as raised by the documents and pleadings filed in the Federal Court and to find the facts as determined by those issues and make recommendations as to what should be done in view of those facts. Now, if there is any insufficiency in the answer filed, that was at least *prima facie* determined when the matter was referred to the Master to determine the facts. We are perfectly

willing informally, or formally, if you desire, to discuss the issues and some discussion as to the legal effect of the answer may be helpful as a preliminary to the taking of evidence, but I take it, in the final analysis, the determination of the legal question must be made by the Court and that the purpose of this reference is to determine the facts and possibly to discuss the law and, undoubtedly, you desire advice upon the issues of law in order to make your recommendation. [213]

We have two main things to be determined. First —I take it it don't make much difference which is first, but one is the issues raised by the petition and the question of whether the petition should be dismissed. That is the matter referred to your Honor for determination:

The second is the question, whether or not Henry Barker, who had been the receiver appointed by the state court for two and three-quarters years or thereabouts and who was continued in possession as temporary trustee on October 22, 1934, should continue in possession as long as this proceeding is pending or until the further order of the court.

Those are the matters primarily raised. They are raised by the answer to the petition, on the one hand, and are raised by our objections to the placing of the debtor in possession and by the debtor's motion to set aside the order appointing the temporary trustee. But, it seems to me after all, that all we have to determine here are questions of fact and such discussion as bears upon the materiality.

THE MASTER: Before we proceed, I notice other counsel in the courtroom. Let's hear whom they represent.

MR. VAN FLEET: Robbins and Van Fleet the debtor and petitioner under Section 77 B.

MR. BEARDSLEY: Fitzgerald, Abbott & Beardsley: I represent Fitzgerald, Abbott & Beardsley and Messrs. Chickering & Gregory. We appear as representing the answering creditors. If any question comes up to require an appearance for the trustee, we will be here for that purpose, but I do not understand the trustee is a party to this reference or needs to be heard.

MR. ROBBINS: You are also the attorney for the trustee under the order of the court.

MR. BEARDSLEY: That is correct. [214]

THE MASTER: Is Mr. Barker a Superior Court trustee?

MR. BEARDSLEY: No. The situation in that regard, if your Honor please, was this: In January, 1932, the proceedings were started in the Superior Court. The proceedings were started by the trustee under the bond issue, the Crocker First National Bank, represented by Chickering & Gregory; it was started in cooperation with the attorneys for the main bondholders and the attorneys for the Oakland Hotel Company. There was a receiver appointed in that Superior Court proceeding on January 19, 1932 and upon order of the court, Fitzgerald, Abbott & Beardsley were appointed attorneys for the receiver, Henry Barker,

and continued as attorneys for the receiver as long as the receiver continued to operate; that is, until the filing of this petition, when the matter came up before Judge Kerrigan, the application of the debtor to be put in possession. On his order, notice was given to the receiver, to the trustee under the bond issue and to a creditors committee, for which we were also the attorneys. We appeared and objected to putting the debtor in possession and the order was made, in effect, continuing the present manager, that is the receiver, as temporary trustee. I discussed at the time with counsel representing the trustee under the bond issue represented by the firm of Chickering & Gregory, the propriety of our continuing to act for Barker now that he was temporary trustee and we concluded that it was proper- I discussed it with Mr. Robbins, representing the debtor, and told him the request was made by the receiver that I continue to act for him; I would not do so if there was any objection. Mr. Robbins said he did not see any reason there should be. still, I went to Judge Kerrigan and discussed with him before the application was made as to whether or not it was proper to continue that re presentation. I told him there would be no formal application for the [215] appointment of myself as the attorney if it was apparent or suggested that there was any impropriety. He stated he saw none, so formal application was made and I, personally, was appointed attorney for the trustee and am still acting.

THE MASTER: We have two trustees here then. The Crocker First National Bank is trustee under the bond issue and Chickering & Gregory represent that trustee. You represent the trustee appointed by Judge Kerrigan, the temporary trustee and he is identical with the receiver appointed by the state court. Is the receiver appointed by the state court represented here?

MR. BEARDSLEY: I correct you slightly, I think. In the state court, Chickering & Gregory were attorneys for the trustee under the bond issue, that we did not appear for. In this proceeding, Fitzgerald, Abbott & Beardsley and Chickering & Gregory, jointly, appear for the protesting creditors, who are the trustee under the bond issue and something over fifty or sixty percent of the bondholders. So, on this record, Fitzgerald, Abbott & Beardsley and Chickering & Gregory are attorneys for the trustee under the bond issue and the bondholders.

THE MASTER: Mr. Beardsley, if this proceeding were to be dismissed, then the matter probably would revert to this Superior Court Receiver?

MR. BEARDSLEY: Exactly.

THE MASTER: Is he represented here this morning or should he be?

MR. BEARDSLEY: It does not occur to me that he should be. There has been no pleading filed by him. He has been appointed at the request of the creditors whom we represent and it was because of our representation of the creditors and for that

reason the court appointed myself personally the individual attorney for the temporary trustee, who was the former receiver. An order was made that as far as possible the management and control and operation [216] that had been continued for a period of nearly three years be continued, the only difference being the jurisdiction transferred from the state court to the Federal Court and that it would go right on as far as possible without any interruption of the operation, on the same basis. The same operations were continued.

MR. VAN FLEET: Now, I will proceed in this matter.

THE MASTER: Mr. Silverstein, do you represent anyone at this meeting?

MR. SILVERSTEIN: I am not particularly interested in this litigation. Indirectly I am interested as representing E. C. Street, who is the trustee of the estate of Wood Bros.

MR. VAN FLEET: If your Honor please, in connection with the appearances, I offer in evidence in this proceeding, the order authorizing the temporary trustee to appoint an attorney, which is his authority to act as trustee. Then, if your Honor please, to straighten out the appearances still more, as I understand, the bondholders committee is here. I ask Mr. Beardsley if he represents the bondholders committee.

MR. BEARDSLEY: The situation in regard to the bondholders' committee is this: Insofar as the bondholders' committee has any legal represen-

tation, it is represented by the firm of Fitzgerald, Abbott & Beardsley. The bondholders committee was appointed under an agreement which expired, under its terms, and only continues to this extent, that the committee has a lien upon the bonds deposited for the amount of expenses which have not yet been determined. Otherwise, the bondholders committee, as far as its services are concerned, is ended, according to the terms of the agreement itself.

MR. VAN FLEET: I offer in evidence then the Bondholders' Protective Agreement, in connection with this proceeding.

The MASTER: Are we proceeding to take evidence? [217]

MR. VAN FLEET: No. This is simply for the sake of the record at this time. He represents the Bondholders' Committee Mr. Beardsley or his firm does.

MR. BEARDSLEY: There is no appearance here for the bondholders' committee.

The MASTER: You say you represent the bondholders' Committee?

MR. BEARDSLEY: No, Fitzgerald, Abbott & Beardsley are the attorneys for the bondholders' committee.

MR. VAN FLEET: There is a question whether or not the committee has been terminated under the agreement.

THE MASTER: Mr. Van Fleet, how am I going to designate you briefly in marking this?

MR. VAN FLEET: Debtor's Exhibit.

THE MASTER: Then it is *Debtor's Exhibit* 1, Nov. 30, 1934.

MR. VAN FLEET: This is the order appointing the attorney.

The MASTER: This will be *Debtor's Exhibit No.* 2, Nov. 30, 1934.

MR. VAN FLEET: Now, may I ask Mr. Beardsley in regard to these bondholders who filed the creditor's answer, have they ever deposited their bonds under the bondholders' agreement?

MR. BEARDSLEY: I understand that every one of them have, Mr. Van Fleet. I am sure of that. I will say this: More than that, the bondholders whose names appear upon the list of creditors [218] filed by the trustee are all of them bondholders who deposited their bonds with the bondholders' committee. That was the only list available to the trustee when the trustee prepared the list of creditors pursuant to the order of court.

MR. VAN FLEET: I will ask this question: Do you intend to proceed later in the proceeding, when the reorganization comes up, as representing the bondholders and maintain that the bondholders' agreement is still in force and effect?

MR. BEARDSLEY: I made a statement a few minutes ago in regard to the effect of the bondholders' agreement and as far as I am advised, that will be my position in regard to it. I have no concealed purpose in making the statement. I stated it as I understand it.

MR. VAN FLEET: The record will show then,

under Mr. Beardsley's statement, at least this much is so, isn't it, that bondholders who have deposited their bonds under the bondholders' agreement have not withdrawn their bonds?

MR. BEARDSLEY: I understand that none of them have withdrawn the bonds or offered to withdraw the bonds. The understanding is as far as the bondholders are concerned, as far as I know, all of the bondholders are in complete accord with the position taken. The bondholders have acted in unity in all proceedings in the last three years and are taking that position, not directly or indirectly as to the petition of the debtor to take this property from the trustee, from the receiver appointed in the state court, who was appointed pursuant to the terms of the bond indenture, and to turn it back to the debtor to be further dissipated, and we represent that sentiment and represent it from all angles, from the standpoint of the trustee under the bond issue, from the standpoint of our individual clients like the Central Bank of Oakland and Kate M. Palmanteer, who own in the neighbor- [219] hood of $150,000 to $250,000 of the $660,000 outstanding bonds, and represent it from the standpoint of the receiver appointed by the Superior Court, and represent it from the standpoint of the bondholders' committee, who at all times has acted in cooperation with the trustee under the bond issue and with the receiver and the person who now is the temporary trustee. That is the position of Fitzgerald, Abbott & Beardsley and myself personally in this case

and indirectly, I take it, of Chickering & Gregory. We are all working together to preserve this security for the creditors and prevent its dissipation by the debtor, its further dissipation.

MR. VAN FLEET: And prevent this proceeding going ahead.

MR. BEARDSLEY: Not prevent its going ahead; having it terminated.

MR. VAN FLEET: Terminated. That is all I want. There is no antagonism. I just want a statement; that is all.

MR. BEARDSLEY: Do you want the record cleared up?

MR. VAN FLEET: Very well. I will proceed. In the first place, with reference to the powers of this Referee. As I take it, in this case, under the authorities, you are really not acting as Referee in Bankruptcy, but are acting as Special Master.

THE MASTER: That is correct.

MR. VAN FLEET: Under Equity Rules 60 and 62. (Reading). Now, the order of reference is entitled: "Order referring specified issues to Special Master." It states: (Reading order of reference).

THE MASTER: Let me state what I understand by it and see if you gentlemen agree. I understand that reference is for the purpose of determing whether this petition should be dismissed.

MR. VAN FLEET: It is a question of law and fact.

THE MASTER: It will involve the question of

the sufficiency of this petition. Not the sufficiency of it as passed upon informally **[220]** or formally by the Judge, but the sufficiency of it in substance and also, whether if sufficient in fact, the facts sustain the allegations.

MR. VAN FLEET: That is my understanding exactly. It is a question of law and fact and you make your recommendation upon both propositions.

THE MASTER: Do you want to discuss the questions of law and the objections to it in the nature of a demurrer or proceed with the evidence?

MR. VAN FLEET: I am going to discuss the question of law this morning.

THE MASTER: That is, the sufficiency of the answer?

MR. VA NFLEET: The sufficiency of the answer in the law.

THE MASTER: Have you any objection to the sufficiency of the petition?

MR. VAN FLEET: No, they have not made any.

MR. BEARDSLEY: The petition is sufficient upon its face.

THE MASTER: Very well ,that is settled.

MR. BEARDSLEY: May I make just this suggestion, Mr. Van Fleet in reading the order of reference left out the last two lines: "To take testimony, ascertain the facts and report said facts with his conclusions and recomendations thereon." I just call attention to that.

MR. VAN FLEET: This is a general reference.

MR. BEARDSLEY: I don't think it is.

MR. VAN FLEET: I will give his Honor the authorities if you will let me proceed with this until I get through. They can make whatever statement they please.

THE MASTER: I think it is incumbent on me to determine the sufficiency of the petition.

MR. BEARDSLEY: The answer. [221]

MR. VAN FLEET: Holt, etc. v. Best, etc. 245 Fed. 354-356 settles the question, if your Honor please, as to what a general reference consists of.

THE MASTER: I have determined that I have the right to hear and determine the question of the sufficiency of these pleadings. You may proceed to discuss the question, whether or not it is sufficient.

[Printer's Note: Transcript, portion beginning with line 12, page 223 and ending with line 20, page 226, designated by Appellant to be printed.]

THE MASTER: Gentlemen, I think I will decide this matter now, because I think these issues are pretty well threshed out and pretty clear.

First, the Court, under this Act, had authority, after giving notice, rather summary notice, to appoint a temporary trustee in the matter to take this property over and when that temporary trustee was appointed, although he personally was

the same trusteeas the trustee who had been appointed by the Superior Court, he became trustee in the Bankruptcy Court, took the property over and now holds it in that condition. The Court either has the authority to dismiss that trustee or add another trustee or trustees in order to insure the protection of property, pending the formal filing of a petition for reorganization by somebody, either the creditors or the debtor. Evidently, the District Judge had some doubt as to whether this petition should be further regarded or should be dismissed, in face of the answer filed. Consequently he submitted to me as special master the question:

(a) Whether the petition of Oakland Hotel Company for relief under Sec. 77-B of the National Bankruptcy Act should be dismissed as prayed in the creditors' answer as filed herein. Of [223] course, no answer was on file, I assume, at the time the Judge made this order, or if there was an answer on file, he had not the time to consider the matter properly and, consequently, acted summarily on it to the extent of appointing the trustee and of determining the general jurisdictional phase of the petition that had been filed by the debtor. So, the question that is presented to me under that first proposition submitted to me is, whether this answer constitutes a sufficient answer to proceed to a trial of the issues on the evidence.

Mr. Beardsley has raised the proposition that the words "good faith" and "need" do not have

a literal meaning in this statute. Rather, they are like, although he did not put it that way, like the word "malice" in a criminal case, where malice has a technical, legal meaning, so that "need" and "good faith" have a legal meaning here. Good faith does not mean, to put it negatively, that the debtor is not acting fraudulently, but rather means there is reason to believe that some method of compromise, or readjustment, or reorganization can be worked out that will be of benefit to the debtor and, at the same time, for that must be considered also, Mr. Van Fleet, some equitable protection to the secured creditors. I do not consider it necessary at this time to decide exactly what these words "need" and "good faith" mean. I think that can be decided much more properly after the evidence is before me, so as to make a concrete rather than an abstract decision of the question. Abstract decisions of questions of law under new statutes such as this are dangerous. That is particularly true as the question which is also submitted here and which the District Court under any circumstance has authority to submit and properly submit is, whether in the event the petition is not dismissed, "This court shall make permanent the appoint- [224] ment of Henry Barker as such trustee or shall terminate such appointment and restore the debtor to possession, or shall appoint a substitute trustee or trustees or an additional trustee or trustees; be and they are hereby referred to W. A. Beasly as Special Master to take testimony, ascer-

tain the facts and report said facts with his conclusions and recommendations thereon." The facts that are referred are taken, usually, as binding on the Court. The conclusions, I think, are advisory merely. The question whether this trustee shall be retained is intimately tied up with other questions involved here. I think, as I say, it is impossible to decide this question in an abstract way, for the circumstances here differ from anything anybody could possibly have anticipated, according to the allegations of the answer, which says that the property should not be in the possession of the debtor, but in the possession of the state court receiver, who, of course, was acting at the instance of the creditors. That gets me back to the question whethea or not the parties here are the proper parties. Mr. Beardsley has made an admission here, but I chose to decide that on the allegations of the answer itself. The allegations of the answer, in the first place, is that they are creditors having provable claims above the amount of their security or more than one thousand dollars. There is something else to be said about these reorganization committees and that is that: While called "trustees", "committees", and so on, they are really nothing more in law than agents of these bondholders and agents for specific purposes. Without having read this instrument carefully, I assume that it is pretty much in the same nature and upon the same terms as propositions of this character generally. If that be so. If that be so, when

a new question has arisen here, there is no reason here why these creditors should not act [225] in their own behalf. Probably the authority given the Committee was not authority to appear in a proceeding of this kind and take part in a proceeding of this nature, under a new statute, which in itself is *sui generis,* different from any statute that I know of. Besides that, it is provided here that this should terminate if, prior to July 15, 1934, no reorganization should be effected. And it may be said also that while it is provided here that these bonds shall be reassigned, transferred and delivered to the persons entitled thereto, that as this Court of Bankruptcy exercises the rules of a court of equity, it must be held, under the circumstances of the case, that what should have been done has been done when that agreement was terminated, which was to reassign, transfer or deliver—I assume they were delivery bonds—the bonds to the people entitled to them or hold them now as a mere custodian for those persons. , So much for that.

I think that I will have to take evidence in this matter. I am ready to begin to take that next Monday morning, if you are ready to present it.

(Adjourned to December 17, 1934. 10 A. M.)
[226]

[Printer's Note: Transcript, portion beginning with line 3, page 245 and ending with line 4, page 245, designated by Appellant to be printed.]

R. W. KITTRELLE

called for the Answering Creditors—sworn.

[Printer's Note: Transcript, portion beginning with line 13, page 245 and ending with line 13, page 253, designated by Appellant to be printed.]

MR KITTRELLE to MR. BEARDSLEY: My name is R. W. Kittrelle and I am in the real estate business in th City of Oakland and have been for many years. I am the regular appraiser for the Central Bank of Oakland, one of the answering creditors in this proceeding, and have been such appraiser for five or six years. I have had wide experience in appraising real estate in the City of Oakland, mainly in the City of Oakland and the East Bay District. I have appeared many times as a witness in court proceedings and before public boards as an expert witness in such matters I am familiar with the Oakland Hotel property It is between Thirteenth and Fourteenth and Harrison and Alice. and have been ever since the hotel was built. The office I maintain in Oakland is within a matter of two or three blocks of the property—has been for many years. I have appraised property in the immediate vicinity of the Oakland Hotel property and am familiar with real estate

transactions in the immediate vicinity of that property. I am familiar with a transaction that had to do with the purchase and sale of the property on which the Oakland Postoffice is now situated, within a block or so of the Hotel Oakland property on Thirteenth Street [245]

I was familiar with the transaction at the time the property was purchased by the United States Government, which was in 1929. I appraised the property as an incident to the purchase. I have also made an investigation and study of the value of the Oakland Hotel property—of the block of land and the buildings and other improvements upon the land, of the hotel equipment situated in the property.

Q (Mr. Beardsley) And do you know what the reasonable market value of the property is? A yes, sir, what I believe it to be. Am I to state that?

MR. BEARDSLEY: No. Pardon me just a minute,

MR. VAN FLEET: At this time, if your Honor please, I object on the ground that the proper foundation has not been laid, and on the question of provability of claims and liquidation of claims in order to support their answer here, that this is not proper testimony, and that will go to all this testimony now.

THE MASTER. Objection overruled.

MR. BEARDSLEY: Q What, in your opinion, is the reasonable market value of the property to which I have referred, that is, the property of the

Oakland Hotel Company, including the land, building, other improvements and hotel equipment, as of the 13th day of November, 1934?

THE WITNESS: A $526,000.

THE MASTER: Just a minute, November 13th?

MR BEARDSLEY: Yes. That is, I believe, the date of the filing of our answer; that is the reason I asked for that particular date. Q What would be the value at the present time today? A I would estimate it at the same, $526,000 would be a reasonable value.

Q Mr. Green suggests to me that our answer was filed on the 15th day of November, instead of the 13th. Would your answer be the same as to that date? A Yes.

Q And at all intervening times since the 15th of November up [246] to the present time, is that correct? A Yes, sir.

Q I wish you would state briefly but with such detail as is necessary to make yourself understood, your reason for your opinion?

A I obtained as many of the statements of income as it is possible to get of the hotel at the present time, and that of other dates. I have in my possession a statement of income for 1925 and with these different statements that have been *fi*rnished me. I was able to determine the percentage of room rentals: in 1925 it showed 54 percent of the rooms rented; in 1929 47%; in 1930 41%; 1931 33% 1932 43%. In 1933 43%. In 1934 47%. I believed that it

would be fair if I would estimate something at least more than the highest point of percentage of occupancy that I was able to get, and took sixty percent. I took the present income they might get and formed that as my basis. I estimated what it would be if it were sixty percent rented. From that I derived a total income, a net of $52,611.72, without depreciation of any kind being charged. I believed, I do believe that any lease that is made today on this hotel or any other should have some sort of minimum rent allowable to the owners plus some percentage of the profit, in the event there is any increase in business. It would be no more than fair, I believe, that that be allowed. I figured it would be as fair as any other way to give the owners six percent of this net rental, so that they would have a rent that amounted to six percent net on $52,600. That is where that figure comes from. I believe that it would be fair. That would be what we would call the minimum rent, plus some percentage that would be agreed on between the operators of the hotel and the owners of the hotel and building. Following that, the depreciation would have to be a speculation on the side—whether enough would be made to take care of the depreciation and taxes from the [247] tenant's side. This would take out, allowing sixty percent of this, would take away so much of the income there would not be sufficient for the tenant to pay the taxes. I am gambling in my figure on the fact that increase of business that is possible to come would give him his chance to get money back

on the taxes and depreciation. I feel that is treating the property very fairly. I feel the fact that the building has been such a heavy investment, has made it almost impossible for them to get sufficient income from rents to help out the income. The cost of remodeling this building would run into a considerable amount of money. There are too many rooms for it to pay on any cost of remodeling. The word I am trying to think of is, cost of duplication. That, in the main, is the basis on which my valuation was made.

MR. BEARDSLEY: That is all.

CROSS-EXAMINATION

MR. VAN FLEET Q How many hotels have you appraised in the course of your experience? A I cannot answer that, Mr. Van Fleet, quite a few Well, the Coit Hotel in Oakland. I appraised it for the purpose of a loan by the Central National Bank; it was a renewal of a loan at the time. I appraised the Whitecotton Hotel. They had a loan on it at the time. They had more on it then than now I don't believe they loaned any more on it. The law requires when a loan is renewed the appraiser of the bank has to make a new appraisal of the property. They did renew it on the Whitecotton Hotel in Berkeley The occasion of that being—that was just a situation in which the bondholders had gone in and taken over the property and this was for refinancing. I appraised the Harrison Hotel in Oakland for the purchaser, Mr. Lewis, Irving C. Lewis. There have been several other hotels

around about Oakland I have made reports on. My appraisal here is based, mainly on income. I did not take into con- [248] sideration reproduction cost. Market value is what I would be interested in. Reproduction would not have a bearing. Reproduction would not have a bearing with it at all, not on market value. I was investigating the hotel for this particular report daily for the last ten days or two weeks—ten to twelve days at least. I talked with Mr. Louvau who is in the hotel,—I went through the hotel with him. That one particular time I suppose I went through the hotel for two or three hours. That is not the only time I went through it. I have known the hotel for years. I don't know how many times I have gone through the hotel. I have been in there, I have gone over there, looked at it a number of times. On this particular report I could not say how many times.

Q What do you mean you looked at it? A Go into the building.

Q What did you look at? A The hotel.

Q You did not have to go into the building for that, did you?

A The inside and the out, Mr. Van Fleet. You cannot see the inside of the rooms without going in. I was not told by anybody to keep my appraisal low, no man can tell me that. No one advised or suggested to me how to appraise it—they don't advise me how to do that I didn't consult Mr. Wainright on the valuation, sir. I got a statement from him as to income on the property at the present

time and what other information I needed I got from him—,I got what information he might have from him. I got information in regard to the statement of income which he gave to me.

Q Didn't you consult Mr. Louvau, the bookkeeper?

A You asked me several questions which I am trying to answer. Mr. Wainright gave me the statement he had in his possession on the hotel income

Q Was your appraisal based on the statement of Mr. Wainwright [249] or the statement of Mr. Louvau? A I suppose they are—

Q I don't want a supposition, I want to know. A I did not base it on anything but the papers given to me. Mr. Wainright delivered them to me.

MR VAN FLEET: That is all.

MR. BEARDSLEY: To the Master and to Mr. Van Fleet: Mr. Kittrelle may be excused? A Yes.

JAMES A. WAINRIGHT Called for the Answering Creditors—*Sworn.

MR. WAINRIGHT to MR. BEARDSLEY: I am the vice president of the Central Bank of Oakland, one of the answering creditors here. and have been since April 1933. Immediately preceding April, 1933, I was regularly employed by the Central National Bank of Oakland. It is about six and a half years since I originally went into the employ of the Central National Bank of Oakland, and my employment has been continuous by these two

banks up to the present time. I am the James A. Wainright who is a member of the bondholders committee which had to do with the deposit of bonds under the Hotel Oakland bond issue. The members of that committee are E. G. Soule and R. W. Kenney, that is correct. I am the chairman of the committee and am familiar with the operation of the committee since its original appointment. I am familiar with the printed copy of the Oakland Hotel bondholders protective agreement dated December 21, 1931.

Q I call your attention to the provisions of the sixth paragraph with reference to the submission of or the adoption of a reorganization prior to July 15, 1933. I will ask you if, prior to that date up to the present time, there has been any reorganization adopted? A There has been no reorganization adopted.

Q I call your attention to the fact that in that same paragraph there is a provision with reference to the extension of the life of the agreement by the giving of notice provided for therein. Was [250] any such notice given? A No, sir.

Q No notice has been given for the purpose of extending the life of that agreement, is that correct? A You are correct.

THE MASTER: Is that to indicate that these bonds on the conclusion of the agreement reverted to the original bondholders?

MR. BEARDSLEY: Yes, it is our understanding, if the court please, that would be the title, the bondholders committee acquiring on the deposit

and we understand they got a legal title. That terminated on July 15, 1933, and I am about to prove just the extent of their claim against these bonds. It is not a claim of title, it is an indebtedness.

THE MASTER: Proceed.

MR. BEARDSLEY: Q Mr. Wainright, have any of the bandholders that deposited their bonds with the committee withdrawn these bonds?

THE WITNESS: A I don't believe so. There may have been some, but I don't believe so. I am familiar with the bond ownership of the bondholders who filed their answer in this proceeding, that is the Crocker-First National Bank, the Central Bank of Oakland, Edmond G. Soule, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffatt, and William B. Faville. I know, as a matter of fact, that the bonds of all of those bondholders were *e* deposited with the depositary pursuant to the terms of the bondholders agreement. I do know that these particular bondholders own the amounts of bonds specified in the answer I have verified in this proceeding, totaling $387,000. face value. The expenses of the bondholders committee have not yet been paid by the bondholders or by any charge made against the bonds; in fact, they are undetermined, but in my judgment it would be a very insignificant amount, not to exceed $2500, probably a great deal less than that. The entire expense of the bondholders committee, including the charges of the attorneys for the bondholders committee will

not [251] exceed $2500. The committee themselves were serving without compensation. The agreement provides that there is no charge against the bonds for any compensation for any of the bondholders committee. The interest on these bonds is in default. It is true that no interest has been paid that has accrued since January 1, 1931, and that the figures alleged in the answer as to the amount of interest accruing up to the end of this month furnished to you by me at the time the answer was prepared, namely $138,400, is correct. That is a matter of mathematics, six times $660,000, being the principal amounts of bonds outstanding. I am familiar with that financial statement on the form of the Central National Bank of Oakland and purporting to bear the signature of the Oakland Hotel Company, W. C. Jurgens, president. It was received in the credit department of the Central National Bank of Oakland on April 14, 1930. I am familiar with W. C. Jurgens' signature. That is his signature on that instrument. He was president of the company at that time.

MR. BEARDSLEY: I offer this in evidence. Are you objecting to that? MR. VAN FLEET: I don't know. Go ahead; you can go ahead.

THE MASTER: If there are a number of these statements, I can mark them all at once.

MR. BEARDSLEY: There are only two of the same kind.

WITNESS TO MR. BEARDSLEY: That other statement also on the form of the Central Na-

tional Bank of Oakland and also purporting to bear the signature of W. C. Jurgens, was received in the credit department of the Central National Bank on February 19, 1931. That is Mr. Jurgens' signature—he was at that time president of the Oakland Hotel Company. I am familiar with that statement. [252]

MR. BEARDSLEY: I offer that in evidence.

Q I show you an instrument that is headed Hotel Oakland Operating Statement. 1929, and ask you if you are familiar with that? A Yes sir. That is part of the files of the Central National Bank of Oakland received by the Central National Bank of Oakland in due course from the Oakland Hotel Company in 1929.

MR. BEARDSLEY: I offer in evidence the operating statement. That is the signature of W. C. Jurgens on the Balance Sheet as per books of Oakland Hotel Company, December, 1929; and was at that time president of the Oakland Hotel Company. I obtained it from the files of Central National Bank. There is no date showing when it was received, assuming it was received through the mail. It was part of the records of the bank.

[Printer's Note: Transcript, portion beginning with line 9, page 256 and ending with line 23, page 256, designated by Appellant to be printed.]

MR. BEARDSLEY: Yes, surely.

Q Mr. Wainright, are you familiar with the

operations of the Oakland Hotel under the receivership of Henry Barker?

THE WITNESS: Yes, sir. I was acting for the Central Bank of Oakland when Mr. Barker was appointed receiver in 1932, and I have been familiar with the operations of the receivership continuously since that time. I was in the Oakland Hotel on the day of January 19, 1932. That was the day Mr. Barker was appointed on the creditors' petition. I went with Mr. Barker, and I believe Mr. Haine of your office—Mr. Frank L. Haine of the office of Fitzgerald, Abbott & Beardsley and Mr. Henry Barker, the receiver. He had then been appointed receiver by the Superior Court of Alameda County.

Q Just what did you find at that time as to the condition of the property and what was the general activity around there?

[Printer's Note: Transcript, portion beginning with line 9, page 257 and ending with end of page 257, designated by Appellant to be printed.]

THE WITNESS: A Mr. Haine, Mr. Barker and myself left Judge Harris' courtroom and went down to the Oakland Hotel. We tried to get in the Harrison Street side, and found the doors locked. Went around on Thirteenth Street side and a young chap at the door happened to know me and let me in. When we came into the hotel lobby, the furniture had been overturned, and a general air of disorder.

MR. VAN FLEET: I move that that go out, the general air of disorder. It does not mean anything.

THE MASTER: It may stand.

MR. BEARDSLEY: Q About what time of day was this?

THE WITNESS: A That was about eleven o'clock, I would say, in the forenoon, on the 19th of January, that being the day on which Barker was appointed. I believe there was one elevator in the hotel running. They had discontinued all service to guests There was a guard at all doors; the doors were locked. The guard recognized me and let me in. I am familiar at least in a general way with the management or operation of the Oakland Hotel prior to January 19th. It was operated by Wood Brothers under a lease. I remember the time in the summer of 1931 when guests in the hotel were notified by the management to move,—were notified that the Oakland Hotel would be closed. Newspaper accounts of the fact of the closing of the hotel were published. [257]

[Printer's Note: Transcript, portion beginning with line 15, page 258 and ending with line 29, page 258, designated by Appellant to be printed.]

THE WITNESS: I attended a meeting that was held under the supe-vision of the Oakland Chamber of Commerce shortly after guests were notified to move. That was in the summer of 1931—

I would say it was sometime the middle of July, if my recollection serves me, of 1931. It was before Woods Brothers management started. To the best of my recollection I would say 150 people were present at that meeting. They were business and professional men of Alameda County that had been invited by the Oakland Chamber of Commerce to attend that meeting. Money was subscribed at that time to keep the Oakland Hotel open,—about $5,000. I know of my own knowledge money was put up and subscribed by the Central National Bank—money was put up to assist keeping the Oakland Hotel open,—contributed by business and professional men of the community. I assume the money was spent for operating expenses.

[Printer's Note: Transcript, portion beginning with line 19, page 259 and ending with line 14, page 260, designated by Appellant to be printed.]

MR. WAINRIGHT: I am familiar with the operation of the hotel by Mr. Barker as receiver, and, as a matter of fact since he ceased to be receiver and became the temporary trustee. And during that time that he operated as receiver I was directly in touch with the operations of the hotel by reason of my membership on the bondholders committee and as an officer of Central National Bank of Oakland. That schedule of figures headed "Hotel Oakland Comparative Operating Statement, Oakland Hotel Company versus Henry Barker, receiv-

er," was prepared by me. Those figures with reference to Oakland Hotel Company management came from the financial statements in evidence here. They are computations and compilations from those statements. The figures referring to the receiver's management are figures with which I am familiar and were familiar as Chairman of the [259] Bondholders Committee, and are the figures given in the receiver's regular reports such as are attached to the petition of the debtor and that statement correctly sets forth the computations made from those respective figures. It shows the income under these managements for the period stated from room rental and other sources also the total gross income, expense for rooms, dining room and so forth, —the total direct expenses, the operating profit or loss, fixed expense, including depreciation, net loss or gain, also the percentage of operating expense to gross income. It also shows a comparison of those figures between the two managements, which figures are from the sources I have stated.

MR. BEARDSLEY: Now, just so that I may be sure that we can correctly read this statement, I withdraw that and offer in evidence this statement.

[Printer's Note: Transcript, portion beginning with line 1, page 265 and ending with line 6, page 267, designated by Appellant to be printed.]

WITNESS TO MR. BEARDSLEY: During

the period of two years and over since the receiver was appointed by the Oakland Hotel, I have given attention to the possibility of the sale of the property, and in that connection have consulted with hotel men with reference to the value or possible sale of the property. I have also consulted with real estate operators in that regard I have made a study of the past earnings and possible earnings of the property with a view of determining its possible sale value. I have dealt with more than one prospective purchaser, approximately a dozen or more during the period of two years and eight months. Yes, I am familiar with the Coit Hotel in Oakland. That belongs to the Central Bank of Oakland of which I am vice-president. It is on Harrison Street within half a block of the Oakland Hotel property.

Q What in your opinion, is the reasonable market value of the property, the Oakland Hotel property, including the equipment therein?

MR. VAN FLEET: We object to that on the ground that no proper foundation has been laid.

THE MASTER: The objection is overruled. This witness has had a great deal to do with the property and is evidently familiar with it, studied its returns and certainly has an opinion as to the value of the property; however, I don't know, Mr. Beardsley, whether it will get him within the purview of the personal property or not. Can you qualify him further? You may, if you can.

MR. BEARDSLEY: Q Your investigation as to the value and possible sale price in dealing with

prospective purchasers, has applied to the hotel building and hotel fully equipped, has it now? THE WITNESS. A Yes.

Q And the studies you made of the values and possible sale of the property has been with the property as equipped at the present time, and as it has been for the last two years? [265]

A As it is, yes.

Q Have you an opinion as to the reasonable value? A Yes.

MR. VAN FLEET: I object again.

THE MASTER: He has asked that as a preliminary question. Don't answer too quickly. What in your opinion is the reasonable value of the property?

MR. VAN FLEET: A proper foundation has not been laid in regard to the personal property, anyway. He has not shown that he has appraised it. He has not made any appraisal of it himself. His appraisal would be all hearsay. I will ask this question. Q Have you ever had an appraisal made of the equipment and personal property?

THE WITNESS: No appraisal was made except for insurance purposes.

Q You had one made for insurance purposes?

A Just for insurance purposes.

THE MASTER: You may answer.

THE WITNESS A $500,000 free and clear of all liens.

MR. BEARDSLEY: If I asked your opinion as to the value as of November 13, 1934 would your

answer be the same?

MR. VAN FLEET: The same objection.

THE MASTER: That would be the 15th.

MR. BEARDSLEY: Q And if I ask for any intervening time to the present time, would your answer be the same? WITNESS Yes.

MR. VAN FLEET: Subject to the same objection, if your Honor please.

MR. BEARDSLEY: Q When you refer to free and clear of all liens, you mean with the taxes pro rated as to the date of sale?

A The taxes pro rated as to the date of sale.

Q During the period of the last two years, in your negotiations for the possible sale of the property, what price net to bondholders have you endeavored to sell it? A $400,000.

Q And have you been able to make a sale at those figures

A No, sir. MR. BEARDSLEY: That is all. [266]

CROSS EXAMINATION

MR. VAN FLEET: Q $400,000 was the outside figure?

A The maximum, yes, sir.

Q You would not appraise it at $600,000? A No, sir.

Q You have an appraisal made for insurance purposes? A Yes.

Q Is that the appraisal which was made for insurance purposes, this is directed to Mr. Kinney,

but I suppose you can testify to it as well? A Yes, that is the appraisal.

[Printer's Note: Transcript, portion beginning with line 5, page 268 and ending with line 18, page 271, designated by Appellant to be printed.]

MR. VAN FLEET: Q Mr. Wainright, you made an affidavit in this case on the Creditor's opposition to the Debtor's request for placing the Debtor in possession, did you not?

THE WITNESS: A Yes, sir. That is my affidavit. I don't repudiate it in any way—it is taken right from the figures of the Oakland Hotel Company, the Barker management. I did state in that affidavit that under the receiver management the following is the showing as to operating profit and loss: operating profit January,19, 1932, to September 30, 1934, $111,785.58. That is correct.

Q So that the receiver's management was better than that of the debtor's to the extent of $11,-600? A Except about $1400 for items which possibly under the Jurgens' management would be charged under operating expense, which items were determined after the affidavit was made.

MR. VAN FLEET: Of course it is filed with the papers, if your Honor please, and I would like to offer it in evidence in connection with this testimony.

MR. BEARDSLEY: There will be no objection.

MR. VAN FLEET: I can put in a copy.

THE MASTER: It is marked *Debtor's Exhibit 4.*

MR. VAN FLEET: Q Now, Mr. Wainright, you testified that all the expenses that you know of that are due to the bondholders committee are $2,500, is that right?

THE WITNESS: A No, I said the maximum expense that the bonds would be held against, would be $2,500.

Q You don't expect that to be increased? A No, I don't. [268]

Q As far as you know, those are the only charges against the bonds? A It is an undetermined amount now. I stated it was my opinion that the maximum expense will not be above $2500.

Q There has been no notice to the various bondholders that that was a charge against their bonds has there, in fact there has been no notice to the bondholders of any kind from the bondholders committee? A Just what do you refer to by notices?

Q Under the agreement here, notice of termination, or notice that the bonds can be withdrawn upon payment of any amount?

A No, sir. Q Mr. Wainright, you are Vice-president of the Central Bank? A Yes, sir.

Q WHo are the holders of a certain amount of bonds? A $148,000.

Q And the appraisal that was made by Mr. Kittrelle, was made after consultation with you, was it not?

A I gave, as Mr. Kittrelle testified, I gave him all the statements I had to show the operations of the hotel.

Q Now, since the receiver has been in possession, don't you think that is a very good showing, $115,000 in two years?

A I think it is a good showing; the receiver made a good showing in comparison with the other management. I advised and consulted with him more or less in the management of the hotel. Since he is trustee under the Federal Court I do not, no, I never interfere in any way.

I only consulted with him since his appointment as trustee under the Federal Court for the purpose of preparing some statements, at the request of Mr. Beardsley, because of my knowledge of the affairs. He does not come to me to decide questions of management. Frequently during his receivership he did ask my advice and counsel, which I gave him.

MR. VAN FLEET: I think that is all

RE DIRECT-EXAMINATION

MR. BEARDSLEY: Q Mr. Wainright, Mr. Van Fleet asked you [269] if Mr. Kittrelle consulted with you before he appraised the property, and you answered yes. Just what do you mean by that?

A Mr. Kittrelle asked me for the operating statements to show the operations of the hotel over a period, which I gave him and I also arranged for him to go through the hotel; that is, I suggested that he go up to the hotel and meet Mr. Lauvau, and go

through and see the physical properties in their present condition. Q Did Mr. Kittrelle ask you the sum at which he should appraise the property? A No. sir, not if you know Kittrelle, he would never ask anyone. I did not mean that he consulted me in reference to the value he should place upon it. I learned of the value for the first time yesterday about three o'clock in your office, in the presence of Mr. Kittrelle and yourself. I had expressed my opinion as to the value before Mr. Kittrelle arrived in your office—the same as I have given here today. That copy of the affidavit that has been put in evidence here as the *Debtor's Exhibit* 4 is an affidavit which I signed on the date it bears, the date it was filed in this proceeding. I read it over carefully before I signed it. In fact, the figures recited in there were supplied in the main by me,—yes. To the best of my knowledge and belief the statements contained in the affidavit are true.

MR. BEARDSLEY: That is all.

RE-CROSS EXAMINATION

MR. VAN FLEET: Q At the time that this suit was brought in the Superior Court of Oakland for the appointment of a receiver, at that time Woods & Company who were the lessees in the hotel had gone through bankruptcy; had they gone through bankruptcy at that time? A They went through bankruptcy afterward.

Q Oh, yes, they went through bankruptcy afterwards; and wasn't this proceeding brought for the

purpose of getting them out of possession?

A No, sir. [270]

Q For what reason was it brought at that time,

A I, as a member of the bondholders committee, called on Woods Bros. and asked them for a statement of their operations, and suggested to them that we bondholders might be agreeable to working out a new lease with them to continue in possession. They gave our committee twenty-four hours to accept the lease that had been made between Oakland Hotel Company and Woods Brothers, which we refused to do, and about a day later, at five minutes after twelve, midnight, they locked the doors of the hotel.

Q Woods Brothers locked the doors?

A And that following morning, at, I would say, nine thirty or ten o'clock we then went to Judge Harris' courtroom for the purpose of having a receiver appointed. It may have been two days after they had given us notice, the ultimatum.

Q Is this the lease with Wood Brothers?

A I never saw the original lease that I know of. I would not be able to tell.

Q If you cannot tell—A I don't recall. I have never seen a copy.

[Printer's Note: Transcript, portion beginning with line 23, page 271 and ending with line 8, page 273, designated by Appellant to be printed.]

E. LOUVAU

called for the Answering Creditors; sworn.

MR. BEARDSLEY: Q Mr. Louvau, what is your position or calling or profession?

A Assistant general manager of the Hotel Oakland since the spring of 1919, continuously, except for a brief period after the Oakland Hotel Company retired from operation. I was employed by the Oakland Hotel Company from 1919 to the summer of 1931, and during the time of the Woods Brothers occupancy, from the summer of 1931 to January 18, 1932, I completed the reports of [271] the Oakland Hotel Company and thereafter I was employed by Woods Brothers. I was employed by them during part of the time they operated the hotel. I was employed by Henry Barker as receiver from the time of his appointment on January 19, 1932 and have been employed by him since his appointment as trustee. I had supervision and charge of the books of account and accounting of the operations of the Oakland Hotel from approximately 1922 or 1923 until the Oakland Hotel Company made their lease, and again when Mr. Barker came in. I have had charge and supervision of the accounting of the operations of the hotel from 1922 or 1923 to the summer of 1931 and then from January 1932 down to the present time. I am not a cer-

tified public accountant but I am an experienced accountant, and during Mr. Barker's management, both as receiver and trustee, I have been the one who kept the records and accounts of that company. During part of the time mentioned I was an officer of the Oakland Hotel Company, Assistant secretary and Assistant treasurer. I am not an officer at the present time. I ceased to be an officer September 25, 1934. I have here a book of accounts showing the account of the receiver's operations and the temporary trustee's operations of the hotel from the time of the appointment of a receiver January 19, 1932 up to the present time. All of those accounts were kept by me personally. I am familiar with the comparative statement in regard to which Mr. Wainright has testified and I have checked the figures on that statement as against the books of account of the receivership that have been kept by me which I have in court. I have also checked the figures there, insofar as they apply to the Debtor's management, the Oakland Hotel's management, as against the statement of condition and the rental statement put in evidence this morning. Those figures, presented on that comparative statement, agree as far as the Debtor's management is concerned, [272] with the figures given on the financial statement and the statement of conditions. They also agree with the figures kept by me under my supervision of the receiver's management.

MR. BEARDSLEY: Now, I would prefer, Mr. Van Fleet, not to put the receiver's books in evi-

dence. They are available if anybody wants them, but they are in constant use, and I would prefer not to have them marked in evidence, because there is a continuous operation of the receiver and the trustee. We did not cause the accounts to be changed, and they are continuous.

[Printer's Note: Transcript, portion beginning with line 17, page 273 and ending with line 2, page, 275, designated by Appellant to be printed.]

MR. BEARDSLEY: Q Now, Mr. Louvau, did you, yourself, prepare a comparative statement covering the same period as Mr. Wainright's statement, as far as the Debtor's management is concerned, and continuing the receiver's management up to the 22nd of October this year?

THE WITNESS: A Yes, sir. The Wainright statement only took the receiver's management to the 30th of September. I did prepare a statement bringing it up to date. The statement you handed me last was the one prepared from the same sources and material as the others. The statement with reference to its correctness would be the same as the previous statement.

MR. BEARDSLEY: We offer in evidence the same statement under the same conditions.

MR. VAN FLEET: Is this the same one?

MR. BEARDSLEY: No, this is brought down to October 22, which was the date of the appointment of the trustee. It supersedes [273] the other

one. That was only to the close of September. In order to make a complete showing of the receivership, we had this prepared down to the close of the receivership, or the suspension of the receivership, whichever it happens to be.

MR. VAN FLEET: Of course this part is argumentative.

THE MASTER: That is the part I spoke of this morning, the right-hand part of this exhibit number six.

MR. BEARDSLEY: That is not in evidence. May I suggest, to clear the record, that the Master simply draw a line through those figures.

THE MASTER: It is indicated sufficiently in the record, what you mean, without that. All the words in the right-hand corner of Creditors' Exhibit No. 6 below the words "Above indicate" are disregarded.

MR. BEARDSLEY: That is in the last column?

THE MASTER: The right-hand column.

MR. BEARDSLEY: Now, this statement that I have now prepared bringing it down to the 22nd of October, has no such notation.

THE MASTER: That will be admitted, Mr. Van Fleet, subject to your objection, with the understanding that it is admitted under the same conditions as attach to Exhibit 6. This will be *Creditors' Exhibit 7.*

MR. BEARDSLEY: Q Mr. Louvau, I show you Creditors' Exhibit 3 for Identification, which

was produced by Mr. Wainright on the stand this morning, and which is headed "Hotel Oakland Operating Statement" and ask you if you recognize that form?

THE WITNESS: A Yes, I recognize the form. It is the form regularly used by the Oakland Hotel Company in 1929 and 1930

Q You recognize that as a statement prepared by you, or under your supervision, of the condition of the Oakland Hotel Company in operation during the period indicated? A I would say it was, except that the figures have not been checked with the books. [274]

Q It appears to you to be a statement which was prepared by you in due course as auditor and bookkeeper for the Hotel Oakland, was it not? A Yes, sir.

[Printer's Note: Transcript, portion beginning with line 29, page 275 and ending with line 25, page 279, designated by Appellant to be printed.]

MR. BEARDSLEY: Now, Mr. Louvau, referring again to this comparative statement of the Oakland Hotel Company management of the Oakland Hotel and the receiver's management of the [275] Oakland Hotel. I wish you would state whether or not the accounts from which these statements were prepared, were kept by the same method of accounting, so as to make the comparison a

true comparison, and if not, in what respect do they differ?

A The method of accounting is substantially the same. There are two exceptions.

Q Would you care to look at this letter to Mr. Wainright as to the figures. There are some items slightly different. I have a memorandum prepared by the witness.

A We are referring to operating figures, I take it?

Q Yes. I wish you would point out the difference, just one minute so that we can get the picture. This statement prepared by you taking the receiver management up to the 22nd of October, shows an operating profit of $115,392.34, that is correct, isn't it? A Yes.

Q And the same statement shows an operating loss for the Oakland Hotel Management for the two years and four months commencing the first of January, 1929, does it not? A Yes, sir.

Q And ending the end of April 1931, that is correct, is it not? A Yes, sir.

Q Now, as compared with that, $4,291.59 operating loss, and $115,392.34 operating profit, I wish you would state what figures there are that enter into those totals that differ as between the two accounts, the accounts of the two managements.

MR. VAN FLEET: The papers speak for themselves, don't they?

THE MASTER: I think I will let him interpret them, he is a bookkeeper.

THE WITNESS: A The only differences are in the prior management all painting and decorating was charged to expense. Under the present management painting and decorating is charged to expense except some decorating, some Crystal Room improve- [276] ments and the Fourteenth Street sidewalk was repaired. Those services were charged to expense, and are now charged to capital, a balance of $1,400.12, which has not been charged to expense under the present management.

MR. BEARDSLEY: Q Then $1400.12 expended under the receiver management, which under the system of bookkeeping used in the figures in the Debtor management, would have been charged as operating expense, is that right? A Yes, sir.

Q And if those figures $1400.12 were charged to operating expense, it would reduce that $115,392.34 item by the sum of $1,400.12, is that correct? A Yes.

Q Are there any adjustments that should be made in order to get a true comparison of the management as disclosed by those figures? A Another item would be that of trade advertising, which is not shown in the receiver's books, which may possibly be set up as an expense. That amounts to approximately $2,700 or $2,800. That would be the balance of trade advertising that is not yet taken out in trade,—advertising had in return for which service is given in the hotel. That expense is

not set up until it is actually taken in trade. Under the system of bookkeeping used by me when employed by the Hotel Oakland that item was called trade advertising. There never was any trade advertising under the other management,—not that I recall.

Q As a matter of fact, if you charged the trade advertising that has not been used in the receiver's figures, would result in a further deduction of that $115,000 odd operating profit by the sum of $2600 or $2700, is that correct? A. Yes, sir. I don't recall any other adjustments that should be made in order to make the figures of the two managements strictly comparable. I have made a study of the figures for the purpose of determining whether or not there is any adjustment that should [277] be made and to give effect to the two items mentioned it would reduce the receiver management operating profit to something in the neighborhood.—about $111,000,—operating profit as compared with $4,-291 operating loss under the debtor management, that is correct.

Q Now, Mr. Louvau, you prepared, did you not, with the assistance of Mr. Jurgens, a list of creditors of the Oakland Hotel Company that was filed in these proceedings, and was used in mailing notices to creditors, did you not? A Yes, sir.

Q And the figures used in this list, as far as the creditors were concerned, other than the bondholders, were figures that were taken by you from the books of the Oakland Hotel Company with the

cooperation of Mr. Jurgens, were they not? A Yes, sir. Those figures were prepared by me with the cooperation of Mr. Jurgens at your request, acting for the temporary trustee. That list correctly sets forth the liabilities of the Oakland Hotel Company.

MR. BEARDSLEY: There is an original of this list in the files. I assume that is not physically here. As a matter of convenience I would like to have a copy, which I state to you is a carbon copy, a true copy, marked as an exhibit, subject, of course, to any correction.

MR. VAN FLEET: Very well.

THE MASTER: It is marked *Creditors' Exhibit* 8.

MR. BEARDSLEY: Now, Mr. Louvau, you said your employment with the Hotel Oakland Company in the summer of 1931, was that you were assistant manager?

THE WITNESS: A Yes, sir.

Q Did you have to do with the preparation and delivery of notices to the guests of the prospective closing of the hotel?

A Yes, sir, I believe I did.

Q Don't you know you*ddid* Just to refresh your memory, you remember at that time, for instance, I was a guest in the hotel, was I not? A. Yes. [278]

Q My wife and myself had been guests there for twelve or thirteen years, had we not, permanent guests? A Yes, sir.

Q Do you not recall that you had prepared and had delivered to me a notice to vacate as of a date some week or ten days after the date and delivery of the notice? A. Yes, sir.

Q And similar notices were given to every guest in the hotel were they not?

MR. VAN FLEET: I think that is true, Mr. Beardsley.

THE MASTER: That will be conceded, won't it Mr. Van Fleet:

MR. VAN FLEET: Yes.

MR. BEARDSLEY: I just want to have it straight. There was such a notice given?

MR. VAN FLEET: Yes.

MR. BEARDSLEY: Q Now, Mr. Louvau, you are also familiar, are you not, with the payment of $5,000 to the Oakland Hotel Company by those who contributed at the request of the Chamber of Commerce?

THE WITNESS: A Yes, sir. That money was paid to the Oakland Hotel Company in the summer of 1931, whether it was all completely paid that year I am not quite certain at this moment. That money was subscribed and paid, all or substantially all, to the Oakland Hotel Company. as an inducement to postpone temporarily the closing of the hotel. The money was received by me in the regular course of business and spent in payment of bills. The hotel was to be kept open in consideration of the contributing of this $5.000 by the citizens, the business men and professional men of the

community, I believe it was, for a period of one month.

[Printer's Note: Transcript, portion beginning with line 2, page 280 and ending with line 24, page 290, designated by Appellant to be printed.]

E. LOUVAU.

Recalled for the Debtor.

MR.VAN FLEET: In the complaint we set out income tax report for the year 1934, which we want to put in evidence, if your Honor please, and have him identify it. It shows insolvency and also the assets.

MR. BEARDSLEY: I have no objection, but I will say this to you, Mr. Van Fleet, as far as the statements attached to your petition, we do not in the answer deny the truth or authenticity of any of them, and the fact that they are correct statements of what they purport to be. That is admitted as far as the creditors are concerned.

MR. VAN FLEET: They will be admitted in evidence.

THE MASTER: They are in evidence, and considered so, that will save you encumbering the record.

MR. VAN FLEET: Now,we brought the monthly reports down to August, I think. We have one or two until you stopped me. Have you the ones for November. the monthly report?

THE WITNESS: A The November report is not out.

MR. VAN FLEET: Well, I will just offer these two in evidence. September and October, the monthly reports.

MR. BEARDSLEY: Now, isn't the September report attached to your petition?

MR. VAN FLEET: No, August, I think.

MR. BEARDSLEY: Very well, there will be no objection.

THE MASTER:They are marked *Debtor's Exhibits 5* and *6*. These reports are for this year?

MR. VAN FLEET: Yes.

MR. BEARDSLEY: Monthly reports of the operation of the receivership? THE MASTER: They are in comparison with corresponding dates for last year? [280]

MR. VAN FLEET: Yes.

THE MASTER: And in the one I have marked No. 5—

MR. VAN FLEET: And then bringing the whole year up to the present month up to the month as I understand, isn't that correct

THE WITNESS: A What do you mean?

MR. VAN FLEET: In other words, if your Honor please, it gives the monthly report and then they give the report up to the end of that month, and then compare it with last year.

MR. BEARDSLEY: You mean for the October statement, it would include the first ten months of 1935; that is the way it is prepared.

MR. VAN FLEET: Yes.

THE MASTER: Either of you may ask any explanation that you care to of this witness, and it will not be objected to because you can interpret them yourself if he makes a mistake.

MR. VAN FLEET: Q The first column of these reports are the operating expense, operating income, operating profit. That one is for the month of October, isn't it?

THE WITNESS: A Yes.

Q The next column is for the total operating expense to the end of October is that right? A Yes, sir.

Q And then there is a comparison between those two figures for last year? A Yes, sir.

Q That is the case in every one of the reports? A Yes.

Q How long since an inventory has been taken of the crockery, silverware and linens at the hotel, do you know? A December, 1933

Q THE MASTER: You take it yearly, do you?

THE WITNESS: A Yes, sir.

MR. VAN FLEET: Q And that inventory and depreciation is not reflected in the report that you made there in regard to the difference between the two managements, is it? A No, sir. [281]

MR. VAN FLEET: I don't think I have anything else.

CROSS-EXAMINATION

MR. BEARDSLEY: Q The matter of depre-

ciation is not reflected in that comparative statement of yours as to the other management, is it?

THE MASTER: Q That is, you have not charged anything off for depreciation in the statement?

THE WITNESS: A Yes, I have, but in the case of the receivership; but any equipment of the Oakland Hotel Company that is worn out has not been charged into depreciation.

MR. BEARDSLEY: Q Well, in your statement of operating profit and loss for the other management is there any depreciation? A Not operating, no.

THE MASTER: Q Does the operating account show any charge for rent, or any charge for taxes or insurance or any thing of that kind?

A No, sir, not the operating account.

Q Does the operating expense that shows here, will it show a profit or loss, leaving out these matters I refer to, taxes, insurance, etcetera?

A By the report it shows a profit.

MR. BEARDSLEY: The figures show for 1934 up to the close of the receivership, $30,431.13 operating profit.

THE MASTER: At this point, may I ask you gentlemen if you can stipulate the amount of taxes as set forth as fixed charges of that character that are not incorporated in this account?

THE WITNESS: A It is shown right in this report, underneath as fixed expense.

MR. BEARDSLEY: We have the fixed ex-

pense. We have not made a comparison of the fixed expense, because that is not reflected in the management.

THE MASTER: This simply, then, is an account of the management? [282]

MR. BEARDSLEY: As far as a comparison of the figures, they are, yes, of the fixed expense, taxes, insurance, bond interest, note interest, depreciation, we treated as fixed expense and carried them for each of these periods; but as far as the figures I refer to, of comparing the management, they are operating figures.

THE MASTER: I see. Then these fixed charged that you have referred to here, would have to be subtracted from the operating profit, would they? THE WITNESS: A Yes, sir.

Q They would be subtracted from the operating profit and that would leave no operating profit at all, any interest on the bonds or anything of that kind, would it? Do you understand what I mean? A Yes, I understand what you mean, but this is the condition I mean here, a net loss or gain after deducting these items?

Q This shows a net loss or gain here, and that loss for 1933 is $1,740.70, after deducting the fixed charge, so-called? A Yes.

Q As under the receivership. and for 1931 there was a gain there.

MR. BEARDSLEY: The 19th of January to the 31st of December, 1932, the first year of the receivership.

THE MASTER: That first year of the receivership showed a gain, did it not?

MR. BEARDSLEY: $2,142.

THE MASTER: The second year of the receivership shows a loss.

MR. BEARDSLEY: $1,740.70.

THE MASTER: Now, the third year of the receivership so far, shows a gain.

MR. BEARDSLEY: That is, up to the suspension.

THE MASTER: It shows a gain of $2,083.04. Now the bond [283] interest, however, is not included in this loss and gain comparison statement.

THE WITNESS: No.

MR. BEARDSLEY: The receiver has not charged himself with bond interest.

THE MASTER: Then on the other hand, he also did not charge himself with any rent?

MR. BEARDSLEY: No, but I think the true basis of comparison is the operating figure.

THE MASTER: I simply want the facts in my mind.

MR. VAN FLEET: I have the account of the present taxes due here. Would your Honor want that?

THE MASTER: I think you had better introduce in evidence anything of that kind you want.

THE WITNESS: A I have the tax bill itself, if you want it.

MR. BEARDSLEY: Well, look at it and give it to him.

MR. VAN FLEET: You mean for the delinquent taxes?

MR. BEARDSLEY: I have set that forth in my answer.

MR. VAN FLEET: You have got it too high.

THE MASTER: Q Have you all of the taxes that are delinquent?

THE WITNESS: A I have a record of them.

MR. VAN FLEET: There is a letter here in regard to them.

THE WITNESS: A Here is the current tax statement.

MR. BEARDSLEY: What is the amount?

THE MASTER: It is not neecessary to introduce that in evidence

THE WITNESS: A The first installment is $14,459.77

THE MASTER: Q What is the second installment? A $12,463.78

Q Has the first installment been paid? A No, sir.

MR. BEARDSLEY: That is the one I was speaking of right after lunch.

THE MASTER: The second installment will be delinquent next April? [284]

MR. BEARDSLEY: That is correct. By the way, with the exception of the installment immediately following the appointment of the receiver in the spring of 1932, the taxes have been paid, before delinquency, during the whole period of the receivership, haven't they?

THE WITNESS: A Yes, sir, taxes since July 1932 have been paid.

Q Delinquent taxes against the property are taxes that had accrued before the receiver was appointed, and the installments that became delinquent in the spring immediately following the receiver's appointment? A That is correct.

THE MASTER: Q Well, how were those taxes paid, were they paid out of receipts of operating expenses, or advances?

MR. BEARDSLEY: O, no, the receivership has paid its way. As a matter of fact, before the receivership went into possession of the property he had no money whatever, did he?

THE WITNESS: A No, sir.

Q There was not even a postage stamp in the hotel in the way of supplies, was there? A There was no money.

Q From the time of the appointment of the receiver, down to the close of the receivership, it operated on its own power as far as the matter of financing is concerned, with the exception of $10,000 borrowed which has been paid off, is that correct? A Yes, sir Q Paid all out of earnings? A Yes, sir.

MR. VAN FLEET: Q And there is money enough on hand to pay the current taxes, is there?

THE WITNESS: A Yes, sir.

THE MASTER: Will the payment of those current taxes put a crimp, so to speak, in your finances, so that you cannot finance the operating of

the hotel or can go ahead with the operation; THE WITNESS: A I think we can go ahead all right.

MR. BEARDSLEY: We have had that up with the trustee and receiver and we can pay the taxes and still operate. If we [285] could not, I would not advise it.

MR. VAN FLEET: Q I don't know where this statement came from but this is a statement which shows taxes that are due, with the moratorium and penalties remitted. According to this statement, according to my understanding, the taxes are paid before April of next year. This is all due on past taxes, is that correct, $58,000?

THE WITNESS: That is correct.

MR. VAN FLEET: I will put that in evidence

MR. BEARDSLEY: You mean with the remission of penalties?

MR. VAN FLEET: Yes. May I put that in evidence?

THE WITNESS: A This is correct, except the accruing interest from October 31 to date of payment would have to be added, whatever sum it would be.

MR. VAN FLEET: I just want the exact picture in regard to the taxes.

MR. BEARDSLEY: That is perfectly satisfactory.

THE MASTER: *It is marked Debtor's Exhibit 7.*

MR. VAN FLEET:, I think that is all now. I

would like Mr. Louvau to return tomorrow.

JAMES A. WAINRIGHT RECALLED

MR. BEARDSLEY: Q Mr Wainright, in Creditors' Exhibit 6 prepared by you, in the lower side of the figures it is headed Percentage, Comparison, Operating Expense, To Gross Income. That does not include fixed expense. Will you explain just what those figures indicate?

A In other words, under the heading "debtor" I show for the year 1929 that the debtor used up $97.15% of its income in paying the operating expenses of the hotel. Those operating expenses, not including taxes, insurance, bond interest or depreciation; that in 1930 he spent 101.59% of his income for the payment of operating expense. In other words, 1.59 in [286] operating expense more than the total income.

Q By "him" and "his" you mean the Oakland Hotel Company? A The debtor. In 1931, 100.-31% of income was used in the payment of operating expenses. Those operating expenses did not include fixed expense, such as taxes, insurance, bond interest, depreciation.

Q How does that compare with the receiver management?

A The receiver in 1932 spent 88.11% of his income in payment of operating expense; in 1933 he spent 89.82% of his income for operating expense. In 1934, up to October 22, he spent 89.92% of his income in operating expense, and the operating ex-

pense did not include in that class either, taxes, insurance, or bond interest or depreciation. In other words, it is a comparable situation in that in the preparation of this statement, I did not assess the debtor with expenses that I did not, in turn, also assess the receiver.

MR. BEARDSLEY: That is all.

CROSS-EXAMINATION

MR. VAN FLEET: Q In other words Mr. Wainright, under an economical administration of this hotel, why, you may make a success of it?

A Mr. Barker lived within his income, in other words.

MR. VAN FLEET: Yes.

RE-DIRECT EXAMINATION

MR. BEARDSLEY: Q Counsel asked you about making a success of it, you did not answer that question.

A It is not a success, for the simple reason that while there is a tremendous improvement in the management of the receiver over the debtor, the hotel is not earning even the interest on its bonds.

THE MASTER: What would be a fair rental value of the hotel? [287] Now you gentlemen can both have an objection to that question if you want, that is curiosity on my part.

MR. VAN FLEET: What is the question?

THE MASTER: If Mr. Wainright can fix what he thinks is a fair rental for the hotel,assuming that the hotel is able to pay rent at all.

THE WITNESS: A I don't believe it could be rented, your Honor. I talked to lessees, other than on the basis of percentage of net profits. In other words, there is no guarantee we have been able to get.

Q That is the general business practice, isn't it, even in the rental of stores? A On the basis of sale, but not today with hotels, where you are turning over to them a stock in trade which would be good will, furniture, fixtures and equipment.

HENRY BARKER

CALLED FOR ANSWERING CREDITORS SWORN

MR. BEARDSLEY: Q Your name is Henry Barker and you are the trustee in this proceeding, are you not? A Yes, sir. And I was the Henry Barker who was receiver in the Superior Court proceeding.

Q I think in order to save time I will ask leading questions on the matter of Mr. Barker's experience.

MR. VAN FLEET: All right.

THE MASTER: Can't you just ask a general question as to what hotel experience he has had?

MR. BEARDSLEY: Q I think I can prove it by going in directly. Mr. Barker, in the year 1894 were you employed by Fred Harvey, in his eating

establishments, you were, were you not?

THE WITNESS: A 1894, yes. From 1894 to 1897. In 1898 I went to Oakland, California, and was in the grocery business for seven months. In 1899 I was managing a house in Arizona, eating [288] houses. In the year 1900 I was working for the Goodrich Transportation Company as steward and I spent four years on the Chicago Nothwestern Railroad as dining room conductor and dining room inspecctor. At the opening of the Saint Francis in 1905 I checked in every piece of furniture that went in that hotel and had charge of the commissary and was kitchen steward. For a period of eighteen months I was general manager of the University Club in San Francisco. In 1905 I was at the University Club about sixteen months and the Bohemian Club until June 1908. In June 1908, I went to the Key Route Inn in Oakland, at that time the leading hotel in Oakland, in 1908, before the Hotel Oakland was built. This was located on Broadway what is now 22nd Street. I continued with the Key Route Inn as lessee until the Key Route Inn was torn down at the time of the opening of Twenty-second Street in 1931. I operated the Key Route Inn during that period from 1908 to 1931. In 1917 to 1918 I was president of the Northern California Hotel Association. In 1926 I was vice-president of the California Hotel Association. In 1927 I was president of the California State Hotel Association, and I have served on the executive board of the Northern California Hotel Association since it or-

iginated. I have operated the Oakland Hotel as receiver appointed by the Superior Court from January 19, 1932 to October 22, 1934, on which date I started the operation of the hotel as trustee in this proceeding, and operated as such ever since.

MR. BEARDSLEY: That is all.

CROSS-EXAMINATION

MR. VAN FLEET: Q Did you ever have trouble with the Government over income tax returns when you were manager of the Key Route Inn over there?

MR. BEARDSLEY: Objected to on the ground that it is incompetent [289] irrelevant and immaterial and not proper cross-examination.

MR. VAN FLEET: Well, you are trying to qualify him here. If he has been up against the Government in violation of the law, this is the Federal Court.

THE MASTER: The objection is sustained; as far as I konw that may be a question that will tend to incriminate him. It would not weigh with me at all as far as I am concerned, because I can see how everybody more or less is up against the Government on income tax, according to the kind of inspector you get. If you get an inspector that wants to make trouble, you can make trouble. I don't think, Mr. Van Fleet, that is important; he need not answer

MR. VAN FLEET: I can make the offer.

THE MASTER: You can make the offer. I sustain the objection.

MR. VAN FLEET: I make the offer that it is not the ordinary case as you stated. I understand he was penalized $14,000 for not making a return, which is a violation of the United States statute, and I make that offer, to prove it. It may not be true, though.

MR. BEARDSLEY: I don't know whether it is true or not. I am going to object to it.

MR. VAN FLEET: That is a very serious matter, if you fail to make an income tax return and are penalized for it.

THE MASTER: I will sustain the objection. Proceed.

MR. VAN FLEET: I made the offer for the sake of the record.

[Printer's Note: Transcript, portion beginning with line 25, page 293 and ending with line 3, page 301, designated by Appellant to be printed.]

JAMES A. WAINRIGHT

Called for the Debtor; sworn.

MR. VAN FLEET: Q Mr. Wainright, I don't know whether you testified yesterday as to how long you resided in Oakland? A About six and a half years. I came from Cleveland, Ohio. I am not a practising attorney. I went to the Hotel Oakland the morning of the appointment of Mr.

Barker as receiver, and [293] took Mr. Barker to the hotel. The Harrison Street door was locked. Mr. George Woods I believe, George Woods or his brother was at the door. We went around to the Thirteenth side and got in Woods Brothers knew the receivership proceedings were to be brought after they served the ultimatum on us to accept the lease they had made with the Oakland Hotel Company. We refused to consider the acceptance of the lease without knowing something of their operations. Mr. George Woods then told me, as a member of the committee, that we had, if my memory serves me right, either twelve or twenty-four hours to accept it. I told him we were not going to accept it. He said "What will you do?" "the only thing we can do, go into court and ask for a receiver to be put in there." We did not anticipate taking it as quickly as we did, because it was about five minutes after twelve at night. The newspapers phoned me at my home to the effect that the Woods Brothers had locked the hotel, and the next morning Mr. Abbott who was the attorney for the committee; had difficulty in getting out of the hotel in order to come to his office to work in drawing the petition to be presented to Judge Harris. It was then between 10:30 and 11, I believe when we came to the hotel. Mr. Louvau resigned as assistant secretary of the hotel company at my request, for the reason I told him he could not work for the receiver and he could not work for the opposing side. I felt in justice to himself he should take either one or the other step.

He elected to stay with the receiver. There was no question but the Oakland Hotel Company was antagonistic to the receiver under the state proceedings. The receiver was for all parties, the hotel company also. The positions were antagonistic because I did not believe that the Oakland Hotel Company was helpful to the re- [294] ceiver during his operation,—they were not helpful to him because there were brought to my attention on numerous occasions that Mr. Jurgens himself made many complaints about Mr. Berker, continually criticising the service of the hotel. This is merely information brought to me, that he had criticised the operations to guests in the hotel. I therefore considered that they were not favorable to the receivership. I considered that the receivership was favorable to them; I think the operation of the receiver for his period was very helpful, in that he preserved the property and made substantial improvements over the operation of the Oakland Hotel Company. There had been income before, but the receiver cut his expenses down more in line with his income.

Q But he was a trustee. You, as a lawyer, realize that he was a trustee, and a trustee just as much for the Oakland Hotel Company as for the bondholders? A I think everything he did as receiver—

Q I asked you that question, is that correct?

MR. BEARDSLEY: Pardon me just a minute: is Mr. Wainwright a lawyer?

MR. VAN FLEET: Yes

THE WITNESS: I am not a practising attorney.

MR. BEARDSLEY: I don't care, if you want to go on. I did not know he had ever been a lawyer. I am not objecting to it as far as I am concerned.

THE WITNESS: A Yes, I believe that Mr. Barker, as receiver, recognized that he was the trustee for all parties, the Oakland Hotel Company, creditors unsecured and secured, every one at interest, I think he so conducted the operations and affairs of the office, with due regard for that interest. [295]

MR. VAN FLEET: Q You consider that he is now, in the Federal Court? A Absolutely.

Q You consider the Oakland Hotel Company is entitled to any information which it can get from the trustee, is that correct?

MR. BEARDSLEY: Just wait a minute. I object to that as calling for the conclusion of the witness. I submit that the witness is not competent to testifiy on that subject.

THE MASTER: The objection will have to be sustained. He may answer for the record.

THE WITNESS: A Certainly, insofar as I know he always has given the Oakland Hotel Company reports of operations, in fact, monthly reports were even given at my suggestion.

MR. VAN FLEET: Q Didn't you ever cut off these monthly reports to us? A No, sir, I did not; not that I recall ever cutting off any reports.

Q I will show you these two letters, and see if you know anything about them? A Yes, I am very familiar with them. This letter was dictated at the direction of Mr. Beardsley, attorney for the trustee.

MR. VAN FLEET: I offer it in evidence, if your Honor please.

MR. BEARDSLEY: Let me see what they are.

MR. VAN FLEET: Q That is why you refused to give me any further reports?

MR. BEARDSLEY: Let me see what they are. No objection.

THE MASTER: The first one is a letter of November 10, from the Oakland Hotel Company to Mr. Barker; that will be marked *Debtor's Exhibit 8,* and the other letter of November 13, Mr. Barker to Mr. Jurgens, will be marked *Debtor's Exhibit 9,* and as we said the other day, they will be deemed read, but I should like to read them first.

MR. VAN FLEET: Q There is just one other question on the letters Mr. Wainwright, Then, if the trustee, or the receiver who is [296] the trustee, represented the Oakland Hotel Company as well as the bondholders, why was it necessary to require Mr. Louvau to resign from the secretaryship of the Hotel Company?

THE WITNESS: A, Just because my opinion of loyalty to an employer is such that you must serve that employer, you cannot serve an adverse interest.

Q Well, you just said it was not adverse. A

No. You asked me what the trustee's relationship with respect to interested parties was, whether his interest was the same. I say that Mr. Jurgens in his actions was adverse to the interest of the bondholders and the creditors.

Q Because he filed this proceeding in this court, this petition? A If you ask my reason, and you have, I will say yes, because he made a failure of the hotel, and the receiver has turned around and made a very substantial improvement, and I feel any action taken by him to put himself back in possession and in the position of operating it at a disadvantage to the creditors of the hotel, is unfair to the creditors.

Q That is what I wanted to know. You say you asked for Mr. Louvau's resignation. A I did not ask; I suggested it to him

Q So you think, Mr. Wainright, that his proceeding here in the Federal Court is destructive of the interests of the bondholders?

A I feel that if there was a reasonable chance at all for the Oakland Hotel Company to form a reorganization I would be heartily in faver of it. In fact, on numerous occasions during the two years and three months of the operation of the receiver, I have told Mr. Jurgens that he should get busy and endeavor to do something to protect his interest, try to work up some plan of reorganization.

Q You have told him that? A Absolutely.

MR. BEARDSLEY: Let him finish.

THE WITNESS: A I have urged him to do so, and if today there [297] was any possible chance of his reorganizing this, he would have my support and the support of these credators, but the obligations against this hotel of over $900,000 in a secured debt, take its past operations, give it the most favorable analysis that you possibly can, and it cannot sustain the indebtedness. You need only know the multiplication table to figure it out. Here is a hotel that is twenty years old, a hotel of 410 rooms approximately, in a city from a hotel man's view point that is considered a suburb, very few transient guests, In order to make it sustaining, or make it profitable, there would need be a considerable capital investment in the way of converting the hotel to the use of permanent guests. I have had and can produce several estimates that have been made for that purpose. Now the hotel for the past, I believe, ten or eleven years, from your own petition, has been unable to earn sufficient to carry the obligations due. You have a $660,000 bonded debt. You have $138,400 in accrued interest to January 1. You have approximately $57,000 more taxes, past due taxes. If you were to add the penalties on it you would reach the sum of $76,000 that I referred to in my affidavit, and I claim, in fact I will defy anyone to show that a structure of that kind can bear an obligation of that size. It cannot be done.

Q Well, under a plan of reorganization, if the obligation is put off for a number of years and

under the conditions over there it ould be worked so that income could be brought in, you would be favorable, would you not?

A I would like to go into that matter with you right now and show you what I tried to work out myself, figures on a long time basis. I would be glad to give you those figures now.

Q We may get them from you later. So you are not favorable to a reorganization plan if it can be worked out? A If it is feasible and logical, yes. [298]

Q You understand, don't you, that listed amongst these bonds, which are listed here, and are scheduled in this action, that there are any number of private trust estates?

A es, I am very familiar with them, because I have talked to a number of the banks who have some of these bonds and trusts. The American Trust Company, for example. There is one back east that communicated with me.

Then you think, as a lawyer of course, you are not in the trust department of the bank but you are vice-president of the Central Bank and a lawyer, that where private trusts are involved of that kind, that if resources would be used in order to work this out and this hotel given an opportunity to see if the assets of the bondholders cannot be increased—

A I am very sympathetic with that idea. For two years and eight months I have endeavored to do something to protect the interests of the other

bondholders, and of my own bank, who have $148,000 of these bonds.

MR. VAN FLEET: I think that is all.

CROSS-EXAMINATION

MR. BEARDSLEY: Q Mr. Wainwright, you have had some experience, have you not, in the matter of reorganization, refinancing and rehabilitation of corporations and other business concerns? A Yes,sir.

Q Over what period of time? A period of about eleven and one-half years. About the first four years of the six and a half years I have been out here I put in most of my time in that particular line of work, that is why I came with the Central National Bank originally for that purpose. Before that time I was put in charge of a large eastern oil company by a bank for the purpose of reorganization. I did reorganize it, yes, refinance it and work out its problems. I was also engaged in that kind of activity during the time I was with [299] the Central National Bank of Oakland, up to the spring of 1933 when that bank ceased to operate. I have not had so much to do with the rehabilitation of the new bank but I have and do possibly once or twice a week go out to various manufacturing and other kinds of businesses for the purpose of analyzing their conditions, making recommendations and of being of help to them. I am not a member of the California Bar. I have made a study of the possible earnings of the Hotel Oakland and the indebtedness

that the Oakland Hotel Company also has about $321, 236.01 of other debts as set forth in the debtor's petition. From the standpoint of reorganization, assuming that the obligations could be spread over a period of ten years, I have taken or have made these computations, assuming that the bondholders were willing to give a ten year extension, on the promise that the current interest be paid, namely, $39,600, which is paying six percent of $660,000 and that the accrued interest, $158,400 be paid one-tenth each year, that means an additional $15,840, and assuming the taxes accrued were paid under the present moratorium one-tenth, that would add another $5,700. Those three items, current interest one-tenth of accrued interest, one-tenth of taxes, and considering as fixed expense, together with current taxes, that can be set at [306] $27,000 a year; adding $2,500 for insurance and adding the very nominal sum of $5,000 to cover replacements of crockery, silver linen, which is extremely low in a hotel of that size, gives us a figure of $85,640 that would be required in operating profit to meet those expenditures, and that $85,-640 is five times the operating profit made by the debtor in the year 1929, which was, in my opinion, a fairly favorable year. It is also equivalent to twice the operating profit made by the receiver in the year 1932, and the receiver is operating the property today at probably the lowest operating expense that that hotel has ever operated, or would ever be operated at in the future. We are not paying

the help as much as we would like to; we are paying as much as the tariff will bear; with a betterment in conditions the cost of operating a hotel in the way of labor would increase. So, that even taking advantage of the low operating cost the receiver has had during the period of depression, he would still have to double that operating profit in order to take care of the charges I just mentioned. Now that would mean also that there would be an extension of ten years insofar as the principal of the bonds were concerned. So, on the basis of those figures I am confident that the debt is too high, the hotel cannot sustain it; the debtor in its petition refers to an operating profit of an average of $110,000 for a seven year period. Were the present obligations to be extended over a ten year period, there would need be a big investment in the way of capital improvements. I have been through the hotel and know the condition of the furnishings and fixtures. I know the carpets are in bad shape and I know that even during the two years term of operations the receiver has spent about $39,000 in capital improvements, all of which have been paid for; but in the figures I have just given I only allowed $5,000 per year. This hotel, in my opinion, cannot sustain an obligation greater than half a million dollars. [307]

Assuming the same operating expenses that are fixed, and the purchaser paying $500,000 for the hotel complete, furniture, fixtures, land, building and good will, free and clear of all liens, and assuming that he made no capital expenditures, that the hotel was in excellent shape, that he was expectant

THE WITNESS: A No, sir.

Q The secured debt you gave what figure? A $660,000, that is the debt you refer to?

Q Of the $660,000 secured debt, no provision for the retirement of that? A No.

Q Does it make any provision whatever for taking care of depreciation outside of this nominal allowance of $5,000 a year [309] for replacement of equipment? A No, sir, just the $5,000, that is all I added here.

Q Does it make any allowance whatever for depreciation on the buildings? A I did not.

Q Did you make any allowance whatever for the renovation of this twenty year old building? A No, sir.

MR. BEARDLESY: I think that is all.

RE DIRECT EXAMINATION

MR. VAN FLEET: Q Under the reorganization scheme then, it is futile to go ahead with the plan? A I feel so.

Q That is the only reorganization scheme that you would agree to at all, I suppose, as representing the bondholders? A No, sir, I did not say so.

Q You did not say that? A No, sir.

Q You don't say it now? A No, sir. The bondholders would be perfectly willing to have some scheme that would work us out of this providing it would logically be possible of fulfillment.

Q It does not have to be that scheme? A No, sir.

MR. VAN FLEET: That is all.

THE MASTER: May I ask this question, since there seems to be some misunderstanding about it: are these unsecured debts that is, these debts not secured by lien on the Oakland property, secured by lien furnished by—

MR. VAN FLEET: By the Charles Jurgens Company.

MR. BEARDSLEY: If you want it for the record, Mr. Wainwright is fully familiar with it.

MR. VAN FLEET: It is in Mr. Wainwright's bank.

THE MASTER: I only ask as there seemed to be some difference between you gentlemen. Are all the debts contracted before Mr. Jurgens gave up the hotel secured so far? They have been [310] secured by security furnished by the Jurgens company, is that correst? Are you gentlemen agreed on that?

MR. BEARDSLEY: All the tradespeople's debts and an indebtedness to the Central National Bank of Oakland.

MR. VAN FLEET: of $104,000.

MR. BEARDSLEY: And which is now the indebtedness to the receiver of the Central National Bank of Oakland, are secured by deed of trust.

JAMES A. WAINRIGHT *RECALLED*

MR. BEARDSLEY: Q Mr. Wainwright, you had to do with the securing of that deed of trust,

did you not? A Yes, sir.

Q It was given at your suggestion? A Yes, sir.

Q You were then acting for the Central National Bank of Oakland? A Yes.

Q And it was given in 1932, or thereabouts, 1931? A 1931 or 1932.

Q Before the first notice to close the hotel? A Oh, yes.

Q About a year? A You mean before that was given?

Q The same year? A The same year.

Q It was a deed of trust given to secure—

A The Central National Bank, and about thirty-two other conveyors for the hotel and so forth.

Q The Central National Bank for something over $100,000?

A Something over $100,000, but this deed of trust given secured ninety-five percent of trade indebtedness because the Charles Jurgens Company were owners of ninety-five percent of the stock of the Oakland Hotel Company, and therefore under their stockholders' liability were only obligated for ninety-five percent of the bills of the Oakland Hotel Company. So that deed of trust secured ninety-five percent of the money due the trade creditors excepting that in the case of Central National hundred [311] percent because they had endorsed the note of the Oakland Hotel Company.

THE MASTER: What I wanted to get was simply the facts whether all the debts contracted by

the Hotel Company, unsecured by the deed of trust that we have been speaking of here, securing these bonds, were secured by this subsequent deed of trust that you spoke of given by the Jurgens Company.

THE WITNESS: A 95 percent of the trade creditors, and an indebtedness to the Charles Jurgens Company, I could not say what happened to that.

Q Ninety-five percent of the trade debts? A Ninety-five percent of the trade debts were secured.

MR. VAN FLEET: I will put this deed of trust in evidence, that will settle the matter.

THE MASTER: Thank you.

MR. VAN FLEET: We may have to withdraw them.

THE MASTER: The first deed of trust dated November 2, 1931, by the Charles Jurgens Company to the Central National Bank, will be marked *Debtor's Exhibit 10,* and the other paper that you furnished here appears to be a resolution of the company authorizing the conveyance, I will attach these together.

MR. BEARDSLEY: That is simply a copy of the resolution authorizing, but that is all right.

THE MASTER: I will attach it loosely, nevertheless, to the deed of trust, and both will be given the same mark.

MR. BEARDSLEY: Q I just want to clear up one point: Mr. Wainwright, there has been collected by a sale of part of the property that is

covered by the deed of trust a sum of money that has been paid on account of those debts originally secured?

THE WITNESS: A Yes. Some parts were sold and the proceeds distributed pro rata among the beneficiaries of the trust.

Q The amount distributed pro rata in reduction of the original [312] debts secured, was $10,-183.77 which is one of the amounts in the list of debts? A I believe it is the same.

MR. BEARDSLEY: That is all.

RE-DIRECT EXAMINATION

MR. VAN FLEET: Then, if this court or some other court should finally decide that this is a proper case for reorganization would you be willing to sit down and work out a plan of reorganization. A I am always glad to do it.

MR. VAN FLEET: That is all.

MR. VAN FLEET: I want to renew the motion to dismiss the answer, for the sake of the record, upon the reference. There is no proof here of their provable claim. The claims have not been properly liquidated as appears by the testimony here. They are still under a bondholders agreement from their own testimony. The securities are more than sufficient to cover the amount of the bonds.

THE MASTER: Well, that motion is denied.

CARL STANLEY Called for the Debtor, sworn.

MR. VAN FLEET: Q Mr. Stanley, where do you reside?

A The Hotel Del Monte. I am managing that hotel. I have been in the hotel business thirty-five years. It has been my life work. I managed the Hotel Clark in Stockton; the Hotel Benson in Portland; the Virginia Hotel at Long Beach. I have known Mr. Jurgens for from twenty to twenty-five years. I knew him all the time he was managing the Hotel Oakland. He stands very well in hotel circles; his reputation and so forth. The standing of the Hotel Oakland was first class while he was managing it. I would not hesitate at any time to send any of my clients there. Mr. Jurgens was president of our state association and he was appointed vice-president of the American hotel Association, a position he held for several [313] years. Recently he was appointed by the California Hotel men to confer with them in the east on the Code; then afterwards he was appointed as one of the Code Authority, to sit in and represent the hotel people all over the United States. I had a chance, many times, to observe the service of the Hotel Oakland at the time he was managing it. In my opinion it was always very well run.

MR. VAN FLEET: I think that is all.

CROSS-EXAMINATION

MR. BEARDSLEY: Q Mr. Stanley, in your reference to the Oakland Hotel and to Mr. Jurgens' management of the Oakland Hotel, you were referring to the care taken of guests? A Yes.

Q And to the class of service given to guests? A Right.

Q And the fact of the matter is that during all that period of years under the Jurgens' management, the hotel was operated as a first-class hotel, a hotel where anyone would be glad to be served, either at meals or in rooms, or otherwise? A Correct

Q I can say that without qualification, because I lived there with my wife for thirteen years, until the termination of the Jurgens' management. There is no question about it. What you say about his management has nothing to do with the financial success or failure of the hotel? A None at all.

Q You are not expressing any opinion whatever upon the financial success or failure, are you? A No, not at all.

MR. BEARDSLEY: That is all.

MR. VAN FLEET: That is all.

GEORGE D. SMITH

Called for the Debtor, sworn.

MR. VAN FLEET: Q Mr. Smith, you are the manager of the Hotel Mark Hopkins, are you not? A I am.

Q And have been for quite a number of years? A Seven years since it was constructed. I am at present manager of the [314] Claremont; previous to that time I was manager of the Canterbury and Biltmore Hotels of this city. I have known Mr. Jurgens personally about fifteen years. He is very

highly regarded by hotel men throughout the state and throughout the nation. He has been chairman and at one time was president of the state association. There has been a sort of rule not to re-elect state presidents more than once. For the last five or six years he has been on the the executive committee of the California Northern Hotel Association. For the last five or six years he has been one of the vice-presidents of the American Hotel Association, and recently he was one of seven members of the National Code, referring to hotels, having the hotel code in his jurisdiction. I have been in the Hotel Oakland many times. I found it is a first-class hotel; it was run as a first-class hotel, operated in the city.

MR. VAN FLEET: That is all

MR. BEARDSLEY: No questions.

JOHN P. JORDAN

Called for the Debtor, sworn.

MR. VAN FLEET: Q Mr. Jordan, what hotel are you managing now?

A The Pine Inn at Carmel. I have been in the hotel business about thirty years. I knew Mr. Jurgens even before that. I have been in the Hotel Oakland many times. I always found it very well run, the service was very good, first-class service. Mr. Jurgens has a very good standing all through the hotel fraternities.

MR. VAN FLEET: I think that is all.

MR. BEARDSLEY: No questions.

MISS ANNIE F. BROWN

Called for the Debtor, sworn. [315]

MR. VAN FLEET: Q Miss Brown, you have lived most of your life in Oakland, haven't you? A I lived some of it; I lived some in the Orient, as a child. Since that time I have lived in Oakland. I have been connected with the charitable and civic organizations there for over twenty years. I have been kept busy. I have known Mr. Jurgens about thirty years. Many times and numerous organizations have used the hotel for various purposes during the time he managed it. I found the service rendered by the hotel was always excellent and most courteous in every way. The Forum had rooms there for fourteen years. I would say with regard to the service received during Mr. Jurgens management as compared to the service received during Mr. Barker's management—under Mr. Jurgens management the services were excellent due to a higher class of persons employed in the hotel, experts and also familiar with hotel service because they were well paid. I would say that under the present administration every effort is made to meet the requirements of persons in the hotel, but that the persons employed must, although I know nothing about the finances, must of necessity be persons who are paid very much less than those previously, for the reason that the service is not what would be required in a first-class hotel but I would say that it is due to the change of the character of persons employed.

MR. VAN FLEET: Yes, Miss Brown, I think that is all.

CROSS EXAMINATION

MR. BEARDSLEY: Q Miss Brown, you have been actively connected with the Oakland Forum ever since it was organized, have you not? A Yes.

Q And the Oakland Forum is an organization of men and women in the East Bay community given over principally to intellectual activities, such as the sponsoring of lectures, en- [316] tertainment, musical affairs by worth-while people, isn't that true? A Especially lectures more than entertainment. It is a serious work. I have been president of the organization a number of years and have had active work in it ever since it was organized and during all those years the Forum has been at theOakland Hotel I have spent a great deal of time there. I have been through all three managements, the Jurgens management, the Woods management and the Barker management. It was the headquarters of the Oakland Forum, that is, its offices and rooms used by the Oakland Forum during all that period. During the Jurgens management our headquarters were on the seventh or top floor of the Oakland Hotel. The rental (I think we had five rooms upstairs) was around $200 a month,—a little over. At the present time our headquarters are on the ground floor. We have been on the ground floor during practically all of the Barker management. In some respects they are more

commodious and more favorable quarters than on the seventh floor,—in some respects not. I was in Europe when they moved downstairs. I think the moving downstairs was perhaps more accessible, especially to the men who were always in a hurry and wanted to be quaited on quickly, but the quiet upstairs was superior and upstairs in every room we had there was an adjoining bath and everything made it more convenient. We have great convenience downstairs. We are paying $150 downstairs as compared with the $235 we paid upstairs. We had five rooms, I think, upstairs. The rooms you are occupying downstairs are more in the nature of business quarters, formerly occupied by the Oakland Chamber of Commerce. May I state?

THE MASTER: Yes.

A When we were upstairs we occupied rooms that were very desirable for guests; they were choice rooms on the seventh floor absolutely quiet, with a view, all of which would be attractive [317] to guests. The downstairs which formerly had been occupied by the Chamber of Commerce had been vacant ever since the Chamber of Commerce left. I considered two or three times going down there during my presidency. I sat there and listened to the noise of the streetcars passing all day long, and for that reason we said we would not take it, but the rooms being vacant and the man operating the organization during the absence of some of us who had taken a trip for a rest, to Europe, decided that it had its advantage. It had. In addition to

using these rooms on the seventh floor and the first floor as the headquarters of the Forum during the last ten years, the Forum has also sponsored many luncheons and dinners in the hotel. We eat there as a board of directors, and then we have large dinners. Last night the Forum sponsored a dinner for 600 at the hotel and each month we have endeavored to give large luncheons there. I am referring to last night, December 17th, 1934, we sponsored a large dinner there. We do it very frequently. We guaranteed to have 600 guests at that dinner. I cannot tell how many came but I know we guaranteed 600. I think there were 600. The dinner was served in the Ivory Ball Room. The Forum paid $1.20 per person I understand the Oakland Hotel management paid the three cents state tax. If they assumed the tax, the amount paid the Hotel Oakland management for the service received for 600 persons last night was $1.17 per person. I assumed the state was paid the usual tax. I know we did not pay it. I think we gave a large dinner to Robert Sproule under the Jurgens management. We had very excellent service under the Jurgens management, given in the Ivory Ball Room, My memory is that there were 700 people at the Sproule dinner given under the Jurgens managemnt. It was not under the Woods management.

THE MASTER: Have you the date, any of you gentlemen?

MR. BEARDSLEY: No, I have not. [318]

Q Well, I will ask a generality. When you had

a big dinner in the ball room of the Oakland Hotel under the Jurgens management, how much did you pay the Oakland Hotel Company per person?

THE WITNESS: A. It varied.

Q Well, give us the figures approximately, it carried between what figure? A Well, I should think $1.25 we paid. I think in those days food was a little more expensive; I think it was $1.25 we paid.

Q Under the Jurgens' management?

A We never give those expensive dinners. Maybe we may have paid $1.30 or $1.35

Q Miss Brown, do you not recall that under the Jurgens' management you never gave a dinner in the ballroom at the Hotel Oakland that you did not pay at least $2.00 for the dinner, don't you remember that?

A I cannot recall that we paid that.

Q Miss Brown, let's refresh your memory a little. You and I have met in the Hotel Oakland many times, have we not, for dinner and other places. Do you remember my wife and I lived there when you were right next door to us on the seventh floor with the Forum, don't you remember that? A Yes.

Q Take the regular dinner served under the Jurgens' management in the Hotel Oakland, I don't mean banquets, but regular dinners served to guests that I ate and other people ate if we went into the main dining room. The charge for those dinners was $2.00 per person, was it not? A In the Crystal Dining Room? Q No, any place

under the Jurgens' management; now that isn't so long ago, you should reme ber that. You have eaten there many times with me, haven't you. A Oh, many times. Q When you went there and ate with me, or by yourself, the cost was $2.00 per person, was it not, in addition to the tip? A I was thinking. You were asking me regarding the price of the Forum public dinners.

Q Talking now of the charge for the regular dinner service. [319] A Oh, well.

Q $2.00 per person, is that right? A Correct.

Q We had high-class captains, high-class waiters and the best of service, and we paid for it, is that correct? A Correct.

Q Now, during the time that we had high-class captains, high-class waiters, it was regular cost with no special service, no extraordinary service, the charge being $2.00 per person for its dinner, special banquet, that is for the Oakland Forum, you never paid less than $2.00 per person to the Oakland Hotel, isn't that correct? A I cannot say that is not correct; I haven't the figures in mind.

Q Have you any recollection of ever paying the Oakland Hotel Company less than $2.00 per person for dinners during that period you and I were paying our $2.00 per dinner, when we went into the dining room as private individuals? A The reason I hesitate is that the Oakland Forum is not a wealthy organization and our members would hesitate paying a sum like that. For that reason I

hesitate answering that, about charging our membership.

Q You would hesitate to pay it now? A We could not pay it now.

Q As a matter of fact, in 1925, 1926, 1927, 1928, 1929 you and I spent money more freely than we do now? A Yes.

Q And you and I are typical of east bay residents? A I think that is true.

Q We paid for service in the Hotel Oakland that we cannot pay for at the present time, didn't we? A That is true.

Q Now, as a matter of fact, you have been, the Oakland Forum has been well satisfied with the Barker management in proportion to what you pay? A Yes, we pay less and we do not expect the service we had when we paid more.

Q You have been well satisfied in proportion to the amount paid in? A Are you speaking now of the food? [320]

Q I am speaking of the whole service you get, in the rooms, and the care that is taken, in proportion to what you pay for it.

A We have not only dinners, but we have many, many lectures. I have been heartily interested in the success of the Oakland Hotel, and have tried very hard to keep the lectures of the Forum at the hotel. It has been impossible for us recently to hold our large public lectures in the ball room of the hotel, even though we have desired to do so.

Q Why? A Because the attention given to

the quiet, and what was necessary for a successful lecture, has been almost impossible to obtain, so recently we have taken many of our public lectures away from the ball room of the hotel across the street to the City Club, due mainly to the noise of the machinery in the hotel in operation, about which not only the audience but the lecturers have complained. Now, after taking that up repeatedly with the management, it may be that the shutting down of the machinery does come to expense to the hotel that it cannot afford, because the hotel has been generous to us in rent, but I cannot say that in every respect we have had satisfaction, but it has come back again to the same statement, the money received from us perhaps was inadequate to warrant the shutting off of the machinery which was necessary for the success of lectures.

Q How much do you pay? A In the evening we paid $25. for the rent of the ball room.

Q How much in the day time? A In the day time $15 for the rent of the ball room.

Q Miss Brown, I show you a letter dated April 27, 1934 addressed to Mr. Barker, purporting to be signed by you. Do you recognize the signature? A Yes, for Doctor Barrows, yes.

Q That letter was dictated and signed by you, was it not? A That is correct. [321]

Q Entirely unsolicited as far as Mr. Barker is concerned? A Whenever—

Q One question at a time; it was entirely unsolicited as far as Mr. Barker or anyone repre-

senting him was concerned, was it not? A Yes.

MR. BEARDSLEY: I offer it in evidence.

MR. VAN FLEET: Let's see it.

THE MASTER: It is marked *Creditors' Exhibit 10.*

MR. BEARDSLEY: That is all.

RE-DIRECT EXAMINATION

MR. VAN FLEET: Q Miss Brown, you have tried to be fair to both sides in this matter, haven't you? A I wanted to because I think both sides have always tried to do the right thing by the Forum.

Q But you would like to see the hotel succeed in the way in which it operated when Mr. Jurgens was there?

A I am very much interested in the Hotel Oakland for other reasons than just personal. I am interested in the downtown district; we consider the hotel a very necessary adjunct to Oakland.

MR. VAN FLEET: Well, thank you very much.

MR. VAN FLEET: If your Honor please, one or two witnesses are anxious to get away this morning. Would you mind running over the noon hour a short time.

THE MASTER: All right.

MARTIN E. MARKS

Called for the Debtor, sworn:

MR. VAN FLEET: Q Mr. Marks, where do you reside?

A Oakland. I have lived there all my life. I am one of the owners of the St. Marks Hotel in Oakland. I have carried on that hotel in Oakland about twenty-six or twenty-seven years. [322]

Q Were you connected with it all that time? A Yes, sir. I am somewhat conversant with real estate values in Oakland. I know where the Hotel Oakland is situated. I have seen it many times. I know where the present postoffice bought by the Government is situated. I consider the Oakland Hotel site as a hotel site, the best available one in Oakland at present.

Q Now, as to the value of the real property itself. The Postoffice building was bought by the government, I think, for $560,000, the real estate? A I believe it was $550,000 to $560,000.

Q What would you say would be the value of the Oakland Hotel site as compared to that?

MR. BEARDSLEY: Wait just a moment. I submit that the witness is not qualified as a real estate expert.

THE MASTER: I think, Mr. Beardsley, it is not necessary to qualifiy him more than to show he owns property of the same character in the same neighborhood. While he may not be competent to pass on the value of the property as real estate, I think he is competent to express an opinion as to the value. Then the weight to be given it will depend on further examination by counsel for the Oakland Hotel Company on cross-examination by yourself. He may answer the question.

THE WITNESS: A Regarding the value of the site?

THE MASTER: Q For the land now, is what Mr. Van Fleet means, if it were bare.

MR. VAN FLEET: What?

THE MASTER: I assumed when you asked for the value of the real estate, you meant independent of any building.

MR. VAN FLEET: Yes.

THE WITNESS: A Due to its proximity to the downtown area, the main intersection of the city, I would say the value would be at least fifty percent higher than the value of the Post Office Building. [323]

MR. VAN FLEET: Q Of course real estate values are low in Oakland now, I suppose? A Yes, sir, very low.

Q And I suppose this litigation over the Hotel Oakland and the building of some of the various properties has kept down values of real estate?
A They have.

Q Would you venture any opinion as to the building on this, do you know enough about buildings or equipment to venture any opinion as to the value? A You mean the present depreciated value, or the replacement value?

Q Well, as to its replacement value, if you formed any opinion on it that is all right.

A I know a building of that character would cost to build about $3,000 a room. Now you could take any depreciation you want, according to the

present physical condition.

Q Now, the building, the Hotel Oakland, the interior does not depreciate very much, does it? A It does not depreciate?

Q Yes, it does not depreciate as much as the depreciation which is written off, for instance for the income tax?

A No, it does not depreciate that fast. To give you an example, they allow our building, a Class B buillding, the Government allows us two and one-half percent per year, which would amortize the cost of the building in forty years. The building will actually be there the way we keep it repaired if we could live that long, 140 years. The Hotel Oakland is a much better building.

THE MASTER: Q What is the character of the Hotel Oakland?

THE WITNESS: A It is Class A throughout. It comes here with your Palace and St. Francis. There are no other hotels to compare with it, none in San Francisco. For instance, it is a much finer building than the Mark Hopkins.

MR. VAN FLEET: Q In fact ,there are few buildings to compare with it on the coast? [324]

A I don't think there are any better buildings.

Q During the Jurgens' regime there, did you have occasion to go into the building and see the interior of it? A Many times

Q Do you know whether it was kept in excellent repair—cut out the excellent—do you know in

what kind of repair it was kept? A At that time?

Q At that time. A Good repair. I have known Mr. Jurgens over thirty odd years. I could corroborate what the previous witness have said as to his standing in the hotel fraternity. I always considered that he carried on the hotel efficiently.

MR. VAN FLEET: I think that is all.

CROSS EXAMINATION

MR. BEARDSLEY: Q Mr. Marks, in expressing the opinion that Mr. Jurgens carried on the hotel efficiently, did you take into consideration whether he made any money or lost any money?

A I don't know exactly what he made or lost, I did not, in giving my opinion, intend to take into consideration the financial success or failure of the operation. In order to successfully operate the hotel it is necessary at some time at least to make money, at least to spend less in operating than you take in in income. Naturally, in order to be a success as a hotel man from a financial standpoint it is necessary to spend less in operating than you make in income. In a measure I have made some study, as to the other possibilities of the Oakland Hotel. I believe it could be operated successfully if it were put into high-class apartments of which Oakland has very few. Something similar to what was done with the Clift in San Francisco. I don't know what it would cost to put it into high-class apartments. I am not a contractor. I don't know

how high class of apartments they would want to put it into.

Q Approximately how much per room do you think it would cost? You estimated $3,000 to build the hotel originally, have you any [325] estimate of the cost of turning it into high-class apartments?

A I have never done that.

Q You have made no stury of that? A No.

Q Have you made any study, whatever, as to the earning capacity of the Hotel Oakland building, as a hotel building situated as it is? A Not particularly.

Q Have you made any estimate whatever? A Any estimate of what?

Q Of the possible earning capacity of the Oakland Hotel land and building located as it is in the city where it is, and built as it is, without remodeling it into high-class apartments or otherwise remodeling it?

A When I spoke of apartments, I did not mean an exclusive apartment house. I meant hotel apartment rooms with apartment service.

Q I am just asking, Mr. Marks, if you made a study—

MR. VAN FLEET: He answered you.

MR. BEARDSLEY: He has not.

Q If you have not, say so, and I will go to something else.

Q Have you made a study of the earning capacity of the Oakland Hotel as is?

THE WITNESS: A I have not.

Q Have you made any study of the operating cost of the Oakland Hotel as it is at the present time, or as it was under the Jurgens management? A What do you mean by making a study, of the business expense?

Q Well, have you estimated what the operating expense would be, or familiarized yourself with the actual operating expense?

MR. VAN FLEET: Do you mean, has he gone over the books?

MR. BEARDSLEY: Well, take one question at a time.

Q Have you made any indirect estimate yourself of what it would cost to you, as a hotel man, to operate the hotel?

THE WITNESS: A No, sir, I was never interested in it. [326]

Q Have you made any investigation of the actual operating costs under the Jurgens' management, the Woods' management or the Barker management? A No, I have not; all I know is it is operated for a great deal less money. Under the the Barker management it is operated for a great deal less money than under the Jurgens' management. The service has been demoralized so much, it was taken out of the employees.

Q By "demoralized", I want to make sure just what you mean by that? If you are going in to that, I wish you would explain just what you mean by saying that the service has been demoralized, under the Barker management. A By comparison.

MR. VAN FLEET: Just a minute.

MR. BEARDSLEY: He has made a statement; he is an experienced hotel man.

MR. VAN FLEET: I was going to ask him.

MR. BEARDSLEY: I am asking him.

THE WITNESS: A I mean the present service is demoralized.

Q Explain what you mean by it? A Just as Miss Brown tells you. You cannot get the same for fifty cents as you can buy for a dollar, whether it is onions, sugar, or hotel service. Naturally, when you pay less wages you are bound to, you cannot expect nor do you get, the service. When you lived in that hotel they ran two or three elevators. Now they run one. I am not speaking derogatorily of Mr. Barker's ability to run a hotel, I am just speaking of the way it is run.

Q Now, Mr. Marks, is that all you meant by demoralization of the service? A No, everything.

Q Just of the service? A Naturally the service.

Q That is what you meant by demoralizing? A Yes, that is demoralizing. Q Did you mean anything else by "demoralize"? A I spoke of the service only.

Q Take one thing at a time. You used the word "demoralize" [327] To me that carries many implications. I want to see what you mean by it. A I said the service was demoralized.

Q I wish you would explain everything you

meant by the term "demoralize". A I will give you some instances.

Q Explain everything you meant by the use of that term, with reference to the service and the management of the hotel Oakland? A I will give you an illustration: where you have less illumination, that is demoralizing the service. Less bellboy service is demoralizing the service; less elevator service, that is demoralizing the business. Poorer service in the dining room, that is demoralizing to service. Give them less laundry, poorer quality, that is demoralizing the service. Give poorer carpets and furniture than they had, don't keep it up, that is demoralizing the service. Does that answer your question?

Q That is all you meant by it? A Yes.

Q All right. Now, as a matter of fact, these guests that have used the Hotel Oakland under the Barker management have paid less for what you designate demorlized service? A Naturally.

Q They paid much less? A Yes.

Q Hav*r* you made an investigation as to the relative financial success or failure as to furnishing the two kinds of service to which you referred? A No, I never have seen the books.

Q In 1929, in Oakland, was a pretty good year, wasn't it?

A The peak of the hotel business in Oakland, to my knowledge, was 1923 in our hotel. I believe in the Oakland Hotel they continued the success of the business to 1925. From that year excepting

this present year, our hotel has earned less every year. I believ that the Oakland Hotel has also, except their peak came in 1925; ours in 1923.

THE MASTER: Q To what do you attribute that, Mr. Marks?

THE WITNESS: A I don't know.

Q Approximately? A For instance, when the all night ferry [328] to San Francisco was installed, from that time on there was a loss in the hotel transient business. Everyone in the hotel industry, in the rooming house industry, suffered a loss. It never has been rectified. We notice it on the books from that very period from a week or two. As I say it has never been rectified and has possibly cut into the profits of all hotels, and from 1923 or 1925 on newer hotels were built. I believe the Coit hotel was built in 1925, the Leamington started in 1925, and was finished in 1927 or 1928. Those are two large places, the former of which has 160 odd rooms, and the latter 240, and more lately there have been other hotels. Berkeley has built a large hotel. Some older hotels have been renovated, brought more nearly down to date. Those all have had the effect of cutting the hotel service. As far as we are concerned, since 1923; I believe as far as the Oakland Hotel is concerned, since 1925, but it is one of those things that is hard to explain. Of course, after the depression came on, back of 1929 we again got a big crack, and as I say, in our business the turn did not come until this year.

Q Has it improved this year? A Yes, our

business is better than in 1933, but for the decade previously each succeeding year was less.

Q You anticipate the upturn to general better conditions, or what? A Oh, they are getting better.

THE MASTER: Proceed.

MR. VAN FLEET: Q And what is your hope for the future in the hotel business? THE WITNESS: A We hope to come out all right, I think we will.

Q With the projected bridge? A With the bridge.

Q And the Fair? A Well, irrespective of the fair, with the prospective bridge I think the Oakland population will [329] increase 125,000 to 150,000 within the first year. It ought to increase the hotel business in the downtown area.

Q And then, of course, there is the liquor proposition?

A Yes. We do not run our own liquor department; we have that leased out. I know the liquor has helped all the hotels that have it, very much so.

MR. VAN FLEET: I think that is all.

RE-CROSS EXAMINATION

MR. BEARDSLEY: Q Mr. Marks, if the night ferry service established in Oakland and San Francisco, in your opinion, had a material detrimental effect on the Oakland Hotel business, it did, did it not?

A When I say all night, I mean automobile

service; when the automobile service started. It was a material detriment to the Oakland Hotel business when automobiles from the East Bay could go to the west side. When we get the bridge built across the say there will be a great deal more traffic between Oakland and San Francisco. We hope for gains from that very thing, from the operation of the bridge. As far as the hotel is concerned I don't figure as a commercial hotel being well located if it is in a suburb. The building of the bridge as far as operating a commercial hotel is concerned may make Oakland more of a suburb to San Francisco than it is at the present time.

RE-DIRECT EXAMINATION

MR. VAN FLEET: Q Since Mr. Barker has been operating that hotel, how has the prices he charges for rooms affected the other hotels in Oakland?

A I use the word "demoralized" again; it has demoralized the hotel industry in the whole East Bay.

Mr. Beardsley: Q You mean by that that he charged too little?

THE WITNESS: A Sure, I believe he charged less than the upkeep, [330]

MR. VAN FLEET: I believe that is all.

MR. BEARDSLEY: That is all.

ERIC H. FRISELL

Called for the Debtor, sworn.

MR. VAN FLEET: Q What is your business, Mr. Frisell?

A I am a consulting, civil engineer. I have had a great deal of experience in all sorts of buildings, ever since 1895. From 1895 to 1900 I designed large bridges, the large bridge at Niagara Falls. From 1900 to 1902 I was designing buildings particularly in the City of New York, taking in apartment houses, loft buildings, hotel buildings. From 1902 to 1906 I was chief engineer for Milliken Brothers of New York in a very large construction work in the northern part of the state. That took in bridge building, foundation work, etcetera. From 1906 to 1908 I was chief engineer in the building of the national theater in Mexico, Parliament buildings and the Postoffice, taking in foundation, concrete work, walls and steel work. And from 1908 to 1912 contracting engineer for the same firm in New York City, during which time we built a number of very large buildings, and from 1912 to 1915 I represented them out here on the Pacific Coast, at which time we built a number of hotels, the Clift Hotel, part of the St. Francis Hotel, and other large buildings. And from 1915 to 1932 I was president of the California Steel Company which fabricated buildings and bridges of all types, and from 1932 to the present time I have been consulting engineer. I was recently called in on the bay bridge as an expert witness in recent litigation over the matter of inspection. I lived in the Hotel Oakland from 1919 in the fall, to 1929 in the spring, nine and one-half years. During that time I had a chance to observe the structure of the building. I knew a great deal

about the structure before [331] I went there because our concern were the contractors, as far as the steel work was concerned, were very well acquainted with the building as a whole. It is a class A building of the very highest type. A building like that in the course of twenty years does not depreciate the amount written off by the United States Government,—it cannot, because it is built so substant*ai*lly that it is good for a hundred years without hardly any upkeep; as far as the shell of the building itself is concerned and its foundation, that building is just as good 100 years from today as it is now, with very slight upkeep, which more or less takes care of leakage in the roof and things of that kind, which are not expensive, and the washing of the walls, which is more for the sake of looks than stability. When I lived there I observed that it was kept in good repair, that on every occasion when there was any cause for slight repairs, whether due to earthquake shocks or whatever nature, they were well taken care of immediately. I also noticed, from personal observation as to upkeep of my own room that it could not have been done better if it had been my own furniture, my own carpet and so forth. In fact, if I am allowed to give an opinion, in all my travels all through the world I have never had the service in any hotel that I had with Mr. Jurgens' hotel during that time. I am not interested in this matter in any way. I haven't a statement of the cost of the building is but I know what the cost is. One was submitted to me.

MR. VAN FLEET: And we will identify it later. This is a statement of the production cost of the building, if your Honor please. I will prove that later, but I want it to be marked for identification.

THE MASTER: It is marked *Debtor's Exhibit 11 for Identification.* Perhaps Mr. Beardsley won't object to it.

MR. BEARDSLEY: I am going to object to any evidence of re- [332] reproduction cost of the building, without showing that it is of any value to the real estate. If it is produced for value as evidence of market value or productivity.

MR. VAN FLEET Now, that is evidence I am going to produce, so you can make your objection now.

MR. BEARDSLEY: I will make the objection at the time you make the offer. Take your own statement in regard to this document as any you produce. I am not questioning the authenticity of any document you produce. If I have any reason to doubt it, I will state it, so I will not make an objection of that kind.

MR. VAN FLEET: You have a perfect right to make an objection to it.

MR. BEARDSLEY: I am not going to. It is not competent evidence. If you bring in a document and state what it is, I will take your word for it.

MR. VAN FLEET: This is a statement of production cost of the building and the additions thereto for the years 1912, 1915 1925, and this has been

presented to Mr. Friselle for his consideration.

Q Now, I ask you if you have examined this?

THE WITNESS: A I have examined it

Q And the production cost there, have you considered what such a reproduction cost would be compared with that statement?

MR. BEARDSLEY: Just a moment, that calls for a yes or no.

THE WITNESS: A I beg your pardon.

MR. BEARDSLEY: It calls for a yes or no answer.

THE MASTER: The question is, have you considered it?

THE WITNESS: A Yes.

MR. VAN FLEET: Q Well, what are they?

MR. BEARDSLEY: I object to the question as entirely incompetent irrelevant and immaterial, and it would be of no evidence [333] as to what it wouod cost to build this building, or reproduce the building, it would have no possible value or assistance in this case at all without it is accompanied by a showing that the building is reasonably adapted to the place of location; and, if so, the evidence should be to market value or earning capacity and not to the matter of reproduction.

MR. VAN FLEET: That is a banker's opinion, of course, we will argue that later.

MR. BEARDSLEY WHETHER You think my objection is a banker's opinion, or what it is, is a matter of no concern to me.

MR. VAN FLEET: You should not be so sen-

sitive. I have to wet nurse his Honor all through this case. I am not attacking your integrity in any way.

MR. BEARDSLEY I don't see any reason why you should.

MR. VAN FLEET He is so sensitive.

THE MASTER If you want to ask the cost price of the building I am going to let you ask it. Mr. Beardsley may have an objection. If you want to ask what it will cost to replace it, I am going to let you ask it. He may have an exception to that also. The cost of the building originally may have some bearing on the character, that is one reason for admitting the evidence. The other reason, the reproduction cost I think may cast some light on the character of the building itself. I am also going to let you ask that question. I don't know that that will mean very much, but it may weigh somewhat. Proceed. Mr. Beardsley you have your objection to both questions, and your exceptions.

MR. VAN FLEET: The cost price is contained in the document.

THE MASTER: He says he can tell you what the cost price is And perhaps you might ask the direct question.

MR. VAN FLEET Q What is the cost price of the building from that document?

THE MASTER: Ask him directly, Mr. Van Fleet, what it cost. He [334] He says he knows. That is better evidence than the document itself, or

his deductions. The document will corroborate his figures on it.

MR. VAN FLEET: Q Well, do you know what the cost of the building is?

THE MASTER: Q What did it cost, Mr. Frisell?

THE WITNESS: A It would cost to build $1,299,191.51

MR. VAN FLEET: Q And what would it cost to reproduce it?

MR. BEARDSLEY: What do you mean, Mr. Van Fleet?

MR. VAN FLEET: At the present time.

THE WITNESS: A According to all statistics and as a matter of my best opinion, a reproduction of a building of this type, compared with 1912 and 1913, is 102%. In other words, the cost of building today is practically double in reproduction of its original cost. The amount is checked by certain things like the steel frame here, which is $141,372.41. As your Honor will notice, it is between 9 and 10 percent of the total cost of the building, of a building of this type, which is more or less as we engineers figure, that the steel frame of a building of this type would be 9 to 10 percent of the total cost. Now, today, that steel frame here at $141,000 could not be reproduced for less than about $200,000 based upon the tonnage that is in the building, and the tonnage prices which are given out on different buildings today, would bring it to $200,000, that being about ten percent of the total cost,

would show a total cost of over $2,000,000, which checks the statistic knowledge that we have that the building today would run about 102% since 1912.

MR. VAN FLEET: That is all.

THE MASTER: Q When was this building erected?

THE WITNESS: A 1912.

MR. BEARDSLEY: No questions. [335]

THE MASTER: The building then is pretty nearly twenty-five years old.

MR. BEARDSLEY: 1912 or 1913, wasn't it?

THE WITNESS: I came out here during the construction of the building. When I came in 1913 I remember I had my first Easter dinner at the Oakland Hotel; that was 1913.

MR. BEARDSLEY: I think it was early in 1913; that would make it about twenty-two years old.

[336] Adjourned to 2 P. M.

[Printer's Note: Transcript, portion beginning with line 2, page 337 and ending with line 30, page 369, designated by Appellant to be printed.]

E. LOUVAU

Recalled for the Debtor.

MR. VAN FLEET: Q How long have you been bookkeeper for the Oakland Hotel Company? A I have been that, and in other capacities in the hotel, since 1922, with the exception of the period

when Woods Brothers managed it, that I mentioned yesterday.

Q During that time you had possession of the books of the company? A Yes sir. I made the entries and kept the books up during that period. From the date of the commencement, 1913 to the year 1930, I made a summary of the income, expense, operating profit, taxes, depreciation and so forth of the company to and including 1930. That is the statement taken directly from the books of the company.

MR. VAN FLEET: I offer it in evidence, if your Honor please.

MR. BEARDSLEY: Would you mind having the witness state a little more what it is a summary of; is it operating expense?

MR. VAN FLEET: Sure, I will give you a copy.

THE MASTER: Have you seen this, Mr. Beardsley?

MR. BEARDSLEY: I have not. Mr. Van Fleet say you have the copy. This is a photostatic copy of the larger sheets.

MR. VAN FLEET: This is a photostatic copy.

THE MASTER: It is marked *Debtor's Exhibit No. 12.*

MR. VAN FLEET: In the year 1931, do you know at what price the bonds of the Oakland Hotel Company had been selling? A In the year 1931? I beg your pardon, the year?

Q 1931. A In 1931 the bonds were being

sold for $1,030 per bond.

Q You know that from the books of the company? A Yes, sir.

THE MASTER: That is a $30 premium?

THE WITNESS: A Yes, sir.

Q In 1931? A Yes, sir. Do you wish me to explain how that came up? [337]

THE MASTER: I was just wondering what kind of bonds could have sold at a premium in 1931.

A May I refer to the books there for the right year? I don't want to make a mistake. This is what was known as the private ledger of the Oakland Hotel Company, if I may refresh my memory. The date was October 31, 1930. At that time we were called upon to pay, there was an amount of $7,000 due on the bond redemption and in order to obtain the bonds for redemption, Mr. Jurgens had to pay a premium of $30 a bond to buy them in.

MR. VAN FLEET: Q That was October 1930.

THE WITNESS: A Yes.

Q That was in 1930? A Yes.

Q And that was the ruling price at that time?

A To the best of my knowledge, yes, sir.

Q In 1931 were they selling at anything like that?

A If I can relate back to looking up the Stock Exchange listing in June of 1931, the bonds were selling, if my recollection is correct, between 103 and 105.

Q That is what I thought. Now, during the pe-

riod of 1920 to 1930, when Mr. Jurgens was manager there, $90,000 worth of those bonds were retired, were they not? A $90,000, yes, sir.

Q Will you look at that and see if that is the correct account in the book. A Yes, that is correct. These dates as listed here are correct.

MR. VAN FLEET: I don't want those in evidence, if the Court please, the last part may go in evidence.

MR. BEARDSLEY: You mean the two paragraphs?

MR. VAN FLEET: Yes.

THE MASTER: It is marked *Debtor's Exhibit 13.*

MR. VAN FLEET: I think that is all of this witness, if the Court please, at this time. [338]

CROSS EXAMINATION

MR. BEARDSLEY: Q Mr. Louvau, the bond interest on those bonds is paid semiannually, is it not? A Yes, sir, the first of January and the first of July of each year. When I referred to the bonds selling at from 103 to 105 in June of 1931 I mean $1030 to $1050 for a $1000 bond and on July 1, 1931, the first of the month following June of 1931 those bonds defaulted in interest. To the best of my recollection, immediately before the default on interest, they were selling at above par. They have been in default of interest continuously ever since,—no interest has been paid at all. Interest was paid on January 1, 1931. I have received sev-

eral listings of their selling price now. I believe 28, people wanted to buy them in at 28, $280. I don't know whether there are any takers. That would be an offer, $280 for a $1000 bond, not a bid. I do not know of any sales within the last few months.

MR. BEARDSLEY: That is all.

RE DIRECT EXAMINATION

MR. VAN FLEET: Q Then the taxes and interest, the taxes on the property and interest on the bonds, were paid up to January 1, 1930? A January 1, 1931.

MR. VAN FLEET: I think that is all.

RE CROSS EXAMINATION

MR. BEARDSLEY: Have you the statement of profit and loss? This in the one in evidence, is it?

MR. VAN FLEET: Yes.

MR. BEARDSLEY: This exhibit No. 12, a statement of profit and loss, is in the usual bookkeeping form, is it not, with the red figures indicating loss, that is correct, isn't it? A Yes.

MR. BEARDSLEY: That is all. [339]

W. C. JURGENS

Called for the Debtor, sworn.

MR. VAN FLEET: Q Before I begin the regular examination, you made an investigation of the records in Oakland, did you not, to determine how much the Government had paid for the Postoffice property? A Yes.

THE MASTER: Isn't that conceded?

MR. VAN FLEET: Yes.

MR. BEARDSLEY: Mr. Kitrelle testified to it.

The only thing as to which is, it was suggested by someone that the Government bought the property in 1932. As a matter of fact, the deeds were recorded in 1929. I mean, in the summer of 1929, and the building has been occupied since, I believe, 1932. It is a 1929 transaction, not a 1932 transaction.

MR. VAN FLEET: Q Is that correct, Mr. Jurgens?

THE WITNESS: A The deeds went on record in 1929.

MR. BEARDSLEY: And are dated in June of 1929.

MR. VAN FLEET: I would like to put it in evidence anyway, if your Honor please, so as to have it for reference in the record.

MR. BEARDSLEY: No objection.

MR. VAN FLEET: Q Now, Mr. Jurgens, you were president of the Oakland Hotel Company?

THE WITNESS: Yes, sir.

Q And how long have you been president of the Oakland Hotel Company? A Since the death of my father in 1926. Before that I was Vice-president and General Manager. I was elected Manager either in October—either in November or December, 1917, that is as manager. I was vice-president at the time. Mr. Carl Sword was manager before me and Mr. Victor Rider before him. At present the Charles Jurgens Company owns control of the Oakland Hotel Company. They own about ninety-five percent of the stock. I am also President of the Charles Jurgens Company. [340] When I went

into the hotel as manager its condition as to equipment, physical condition, was very good. As occasion required I added to that equipment—put in a laundry, dug a well, put in an incinerator, bought furniture, bought the necessary replacements, linens, silverware, carpeting, maintaining the hotel. We finished the seventh floor. It had been occupied by the Commercial Club; it was a large room occupying the entire north wing of the building, and we determined that it would be well for us to turn that into rooms, so I finished the job of turning that loft space, or club room space into rooms. I think we built twenty-one or twenty-two rooms. If I remember correctly the expense was—the booksfigures were somewhere between $35,000 and $40,000 without any furnishings. Then I had to furnish it. We did not fully furnish it. I imagine we spent somewhere in the neighborhood of $10,000 in furniture, carpets and so on. We maintained the necessary equipment to run the hotel. As it was used up it was replaced. These are the figures that we turned over to the Woods Brothers, if I remember rightly,—in 1931. That was prepared by our auditor, Mr. Louvau.

MR. VAN FLEET: I will offer it in evidence.

MR. BEARDSLEY: That is the statement of the inventory at the time that Woods Brothers took possession, is that right, Mr. Van Fleet:

MR. VAN FLEET: Yes.

THE MASTER: It is marked *Debtor's Exhibit 15.*

THE WITNESS: A You see, the hotel was equipped, the equipment of the hotel was very fine, and I maintained that equipment throughout, silverware, crockery and linens.

MR. VAN FLEET: Then, while you were manager of the hotel the Charles Jurgens Company advanced certain moneys to the hotel, didn't they? A Yes, sir. [341]

When I went out as manager there were a number of trade creditors and I secured that by a deed of trust which went in this morning.

Q Are these the accounts of the moneys loaned by your company to the hotel; that is not denied in here, but we just want the record clear.

MR. BEARDSLEY: As part of the indebtedness you allege; we have not denied it.

THE MASTER: It is marked *Debtor's Exhibit 16.*

MR. VAN FLEET: Q Now, that list was paid by your father?

THE WITNESS: A By the Charles Jurgens Company, of which he was president, and controlled most of the stock. We thought it would be a good investment, so we gradually absorbed the stock of the company over the course of two or three years. You see, we originally went in there as subscribers. The building of the hotel was a civic proposition, and we subscribed at the time, if I remember rightly, something like 240 shares. We also subscribed to the bond issue. I think it was $25,000 and the hotel ran along for a while, assesments were levied,

father and I thought we could make something out of the institution by taking up the stock as it was offered, and we did so, until we gradually accumulated up to ninety-five percent. of the stock. I haven't the exact figures in my mind right now, but the family's invest in that hotel at the present time is over a million dollars.

MR. VAN FLEET: Q Well, that is the original investment, and then the family advanced an other $308,000? A That has got nothing to do with the stock investment.

Q Over one million dollars in the stock investment? A Yes. Then he Charles Jurgens Co. loaned another $308,000, so the investment at the present time is approximately $1,308,000 and $161,000 of that is secured by our other real estate in the city of Oakland. [342] Everything in the city of Oakland of the Charles Jurgens Company is hypothecated to secure that $161,000. When I went into the hotel we took control of it, and even before, it had been our aim to make the Hotel Oakland the outstanding institution of the city. When we came in absolute control, we maintained that policy of very high-class standards of operation, catering to a very fine clientele. The decrease in the profit of the hotel operation was gradual. It started in 1925. The main reason for it at that time was the epidemic of hoof and mouth disease that absolutely paralyzed business in California and the inauguration of the all-night ferry service by the S. P. That had a great deal to do with our bus-

iness that came in from the Valley, especially the San Joaquin Valley. Instead of stopping over, they went across the bay. For example, they would go to town, go over there and get themselves located and go home. Now, the reason for that is that most of those people from the valley would drive over to the city; they would come in late in the evening and stay in Oakland and do what they had to do and leave the following night, or the following morning. That business was entirely lost and was reflected in all the hotels in the city. We drew our clientele from all over the world, from New York City, Los Angeles, during the years the hotel was prosperous. I think the Chamber of Commerce left the hotel on first of July, 1929. At one time they paid us nearly $1000 a month. Then when the Commercial Club was given up, if I remember rightly, this is all rather vague in my mind, when they moved downstairs they paid $500 a little while, and finally $250. At that time all the principal social events of the City of Oakland were held in the hotel, dinners, dances civic socities and other functions.

MR. BEARDSLEY: Mr. Van Fleet; you said "at that time". I don't believe that is definite.

MR. VAN FLEET: No, it is not definite; during the period of— [343] let's let him state the time.

THE WITNESS: A During the period I was manager.

Q During the period you were manager, is

this an account of your salaries? I am trying to give the court the whole picture. A Yes, sir.

Q And you know the salaries paid by the other managers? A Yes, sir.

MR. VAN FLEET: Is there any objection to that?

MR. BEARDSLEY No.

MR. VAN FLEET: I offer it in evidence.

THE MASTER; It is *Debtor's Exhibit 17.*

MR. VAN FLEET: During the time that you were manager there, how did you pay your advertising account?

THE WITNESS: A All our advertising accounts were paid in cash.

Q Well, I have a statement from 1925 to 1931, is that the time they were paid in cash there? A At all times. We never accepted trade ads. We always deemed it best to pay for what we got and have the other fellow pay us for what he got. It prevented a form of "chiseling" that is indulged in by a lot of advertising firms in selling these contracts at a discount.

Q Are those the sums you paid from 1925 to 1931? A Those are taken from our books, yes.

MR. VAN FLEET: I offer it in evidence.

MR. BEARDSLEY: No objection.

THE MASTER: It is *Debtor's Exhibit 18.*

MR. VAN FLEET: Do you remember the circumstances of the closing of the hotel down in 1931, was it? What happened at that time? THE WITNESS: A The hotel was not closed in 1931.

Q I mean when you retired from the management? A Yes, I remember that, The Charles Jurgens Company had decided at a meeting not to advance any further money to the hotel for the payment of taxes or interest, and decided that it would cease [344] operating the hotel on the first of July. According to the resolution, the Oakland Hotel Company authorized me to go ahead and notify the guests the hotel would cease operation on that date, if I remember rightly. Then the people of the City of Oakland, through the Chamber of Commerce held a meeting and prevailed on us to keep the hotel open until another purchaser could be gotten, or a lessee, and they agreed to pay the sum of $5,000 to help defray the expenses for that period. The Chamber of Commerce tried, and did finally bring a client by the name of Woods Brothers to lease the property and a lease was entered into with them on a percentage basis. They were lessees secured through the Chamber of Commerce and a real estate man in Oakland. This is the original lease entered into with Woods Brothers.

MR. VAN FLEET: I offer it in evidence, if your Honor please.

MASTER: It is marked *Debtor's Exhibit 19.*

MR. VAN FLEET: Q Are these the copies of the minutes of the Charles Jurgens Company, a regular meeting hold on the 13th of April, 1931, special meeting held on May 28, 1931, special meeting hold Friday June 5, 1931, special meeting held Tuesday June 30, 1931; special meeting held Fri-

day, July 10, 1931; special meeting held Monday July 13, 1931, I suppose; special meeting held Wednesday, July 29, 1931, and the Oakland Hotel Company's minutes. This has to do with when the Jurgens Company withdrew from the management of the hotel. The minutes of Oakland Hotel Company, special meeting of April 15, 1931, this is the Oakland Hotel Company; special meeting of Thursday, July 2, 1931; special meeting of August 11, 1931, and the meeting that I put in evidence already June 4, 1931, and special meeting of the Stockholders of the Oakland Hotel Company, on June 4, 1931. Are these all copies of those minutes? A Yes.

MR. BEARDSLEY: Are you offering them in evidence? [345]

MR. VAN FLEET: Yes. as much for your advantage as my own. I want to paint the whole picture.

MR. BEARDSLEY: We make no objection.

THE MASTER: I will mark this entire series of papers with one mark, *Debtor's Exhibit 20.*

MR. VAN FLEET: Q Then, Mr. Jurgens, when the Woods Brothers went into possesion, they went into possession as your lessee?

THE WITNESS: A Yes, sir.

Q Then what happened, do you know? A They operated the hotel until the time the receiver was appointed.

Q And then the receiver went into possession? A Yes, sir.

Q But the Bondholders Committee never took possession from you? A No, sir.

Q Except through the receiver. I have here renewals and replacements taken from the books from 1926 to 1931, which shows the amount of money spent upon that. Was that taken from the books? A Yes.

MR. BEARDSLEY: What is the date, Mr. Van Fleet?

THE WITNESS: A 1926 to 1931. It shows what the renewals and the replacements were, carpets, crockery, furniture, fixtures, glassware, linens and silverware.

MR. VAN FLEET: I will offer it in evidence.

THE MASTER: It is marked *Debtor's Exhibit 21.*

MR. VAN FLEET: So far as you know, you never gave up physical possession of the property to anyone except to the trustee—the receiver?

THE WITNESS: A Yes, sir.

Q Now, Mr. Jurgens, I wish you would tell the court what you contemplate, if permitted to do so, with reference to the property, what sort of plan you wish to present?

A Well, on my return from Washington, I stopped over at [346] Los Angeles and consulted one of the best hotel brokers of the Pacific Coast regarding a reorganization plan under this Act, Section 77-B.

THE MASTER: You are starting a new proposition, and we will take a five minute recess.

(Recess)

W. C. JURGENS RECALLED

THE MASTER: You may proceed, Mr. Jurgens, to answer the question.

THE WITNESS: A We discussed many schemes for a reorganization plan, taking into consideration the fact that with the return of liquor there would be a greater income. With that prospect, and the amount of business getting better, in view of the fact that the bridge was coming along and would help our city, we figured that a plan of reorganization like this—this was a tentative plan —it was considered by him a reasonable tentative way of handling it. The bonds of the Oakland Hotel Company, according to the bond indenture, became due on January 1, 1940. We thought the proper thing to do would be to extend the life of those bonds ten years at the same rate of interest that they carried; that a plan of amortization be proposed not to exceed at any time five percent as a maximum after 1940. It was thought best to take and change the stock of the Oakland Hotel Company, that is, the preferred stock which carried seven percent, and is cumulative after the first dividend was paid, to make that common stock. During the period from January, 1934, to 1940, the bonds were not to carry any interest during that period except as earned after the expenses of the hotel's operation had been paid, and taxes, and so on. In other words, they were income bonds for the period of five years. Then for the following ten years of the extension they to carry on. The

question of taxes, delinquent [347] delinquent taxes, was to be adjusted at the time of the discussion regarding the reorganization with the bondholders, go into that in very minute detail. We figured that this would be a question for discussion and adjustment at the time that we got together for a reorganizaion plan. The reorganization plan as I outlined, was the basis of what we thought would be fair and equitable under the circumstances.

Q Why are you anxious to take over the burden of rehabilitating the hotel, or rehabilitating the business of the hotel?

A Well, there are several reasons. Of course the Charles Jurgens Company has a very large investment in there. I feel that we can recover some of that investment, and I feel that with the return of liquor, the general increase in business that has been indicated in the last six or eight months, that with a reasonable reorganization plan, that would give the Charles Jurgens Company or the debtor, a chance to work itself out by rejuvenating the management of the hotel; we could work this thing out in the period outlined in the reorganization.

Q Over a period of five years? A Over a period of fifteen years altogether.

Q Well, in rejuvenating the management of the hotel, what do you mean? A Well, I mean by that, that under my supervision probably I would get a young, live hotel man, that would come in here and put a little ginger into the operation of the institution. Not particularly criticising the

present management,—none whatever. As compared with my management they have been able to carry on more economically because they have cut in wages, they have cut in service, they have cut in operation all the way down the line. I think we can do as well, if not better, because we have the good will of the community, as well as the traveling public with us, [348] I have consulted with some of the merchants in Oakland and they assured me they would take care of any of my wants. At present I am a member of the National Hotel Code Committee, Section 77-B is being taken advantage of all over the United States and is increasing daily. According to reports, all of the first-class hotels in the country were in distress in that period, great distress. The depreciation of furniture fixtures and building depreciation itemized there is based on the maximum figures allowed hotels by the Income Tax Division of the Internal Revenue Bureau. There is no question but that the actual depreciation of the Hotel Oakland is much less than that, because the hotel has been kept up, that is, it was kept up until the time that I retired. We spent a great deal of money in the upkeep of the Hotel Oakland. The obstacles of night ferries and clubs have been overcome by the present management. The increase in population and so on gradually absorbing those things, the liquor problem entered very vitally into the profits of hotels. It will be more so as things go on. As I understand it now the liquor is paying the taxes I would not attempt

it unless I thought I could work it out. In fact I feel it more or less a duty.

MR. VAN FLEET: I think that is all for the present.

CROSS-EXAMINATION

MR. BEARDSLEY: Q Mr. Jurgens, who is the hotel man in Los Angeles that you consulted with in reference to the reorganization of the Oakland Hotel? A Mr. E. W. Cason.

MR. VAN FLEET: Q What is his address? A It is in the Rowan Building, Los Angeles.

MR. BEARDSLEY: Q When did you consult with him? A On my return from Washington, I think it was last August. I consulted with him in Los Angeles.

Q On this suggested plan of reorganization, was there any pro- [349] vision for the payment of any interest to the bondholders prior to 1940? A Except it was to come out of the income, if any. There was no provision for the payment to the bondholders of the interest that has accrued from January 1, 1931 up to the present time except as it might come out of income. My plan contemplated that the bondholders should take the chance with the management of the Hotel Oakland for any interest return for a period of nine years. I will say it took care of the interest from January, 1935 to January 1940. We did not consider that past interest for the simple reason they had not earned it

and had not gotten it. The reorganization plan discussed by myself and Mr. Cason together did not take into consideration at all the $158,000 of interest accrued up to the end of the present calendar year,—we figured that was lost already. I figure it is lost for the simple reason you have not earned it, it is lost. I doubt if it will ever be paid. There may be some scheme of repaying that $158,000 but I have not been able to work it out,—I have been unable to find any feasible plan for paying that $158,000, or any part of it, nor of the back interest. As to the delinquent taxes for the years 1931, 1932 accruing under the former management, that was to be taken up and discussed at the time the reorganization committee got to work and worked out the scheme. In my discussion with Mr. Cason it was figured that some provision would be made by this committee when they got together to take care of these taxes delinquent since 1931-1932, a commttee of the bondholders and creditors to discuss a reorganization plan as outlined or as suggested in Section 77-B. I have not worked out any plan for the debtor for the payment of these taxes. I haven't given any possible plan thought enough so as to suggest a possible plan. Those taxes without penalties or interest amount to some $57,000. In my discussion with Mr. Cason no provision for the unsecured [350] indebtedness of the Oakland Hotel Company particularly owing to the Charles Jurgens Company was discussed. The indebtedness

the unsecured indebtedness of the Oakland Hotel Company, that is the unsecured as far as assets of the Oakland Hotel Company are concerned, amount to something over $320,000, I believe.

Q And you recognize, do you not, that those creditors have a prior claim to the stockholders of the Oakland Hotel Company, that is correct, is it not? A Which creditors?

Q The unsecured creditors of the Oakland Hotel Company?

A The unsecured creditors are the Charles Jurgens Company, the other creditors have all been secured by a deed of trust given by the Charles Jurgens Company.

Q Now , is it not a fact that as far as this petition that you signed here, the petition for an opportunity to present a plan of reorganization under Section 77-B, that is the petition of the Hotel Oakland Company, is it not, or, the Oakland Hotel Company? A Yes, sir.

Q You signed as president of the Oakland Hotel Company? A Yes.

Q It is not, as a matter of fact, and you did not intend it to be the petition of the Charles Jurgens Company, did you? A The Charles Jurgens Company authorized it.

Q The Charles Jurgens Company authorized the vote of its stock at a stockholder meeting of the Oakland Hotel Company, that is correct, isn't it? A Yes.

Q And it authorized you, as the president of

the Charles Jurgens Company, to go into meeting of the stockholders of the Oakland Hotel Company and vote the Charles Jurgens Company stock in favor of the taking of steps under Section 77-B, that is correct? A That is not true, no, sir.

Q What was the authorization to be to which you refer?

A The Charles Jurgens Company passed a resolution, you have it here, I don't know just what the wording of it is, asking [351] the Oakland Hotel Company to petition under this Act, Section 77-B, for a reorganization, then the directors of the Oakland Hotel Company had a meeting and passed the necessary resolution to go ahead, which we did.

Q Well, taking one resolution at a time, the resolution passed by the stockholders of the Charles Jurgens Company is a resolution, a copy of which is attached to your petition filed in this proceeding, marked Exhibit "E", is it not? A I don't remember now.

Q I will show you a copy, just as a matter of convenience, that is the resolution you refer to as having been passed at stockholders meeting of the Charles Jurgens Company? A Yes.

Q And the resolving part of the resolution was that in pursuance of this, the company is authorized and directed to secure action to that end, that is, under Section 77-B? A Yes.

Q "By the board of directors of Oakland Hotel Company at any meeting which has been called, or

which may be called by that body, and the president is hereby directed to see that the resolution is passed by said body, taking advantage by the corporation, Oakland Hotel Company, of said Amendatory Act of said Congress, being Section 77-B" that is the substance? A Yes.

Q You were authorized by the Charles Jurgens Company, the ninety-five percent stockholder, to proceed through Oakland Hotel Company, is that right? A That is correct.

Q Now is there any division in the Charles Jurgens Company in that action?

MR. VAN FLEET: That is immaterial, if your Honor please, and I object on the ground that it is incompetent, irrelevant and immaterial.

MR. BEARDSLEY: I take it, the whole picture here, and particularly the sentiment of the Charles Jurgens Company toward the debtor is of utmost importance. I take it that any plan of [352] reorganization that could be worked out, would have to contemplate the attitude of the Charles Jurgens Company. I think under those circumstances it would be interesting to know what the attitude of the Charles Jurgens Company's stockholders is?

MR. VAN FLEET: I don't think it is material.

THE MASTER: The Charles Jurgens Company has 95 percent of the stock.

MR. VAN FLEET: Yes.

THE MASTER: I assume that Mr. Jurgens,

who apparently controls that company, is in favor of the reorganization, and its consent was not necessary to obtain.

MR. BEARDSLEY: Q What was the vote?

THE MASTER: I think the vote can be given; I don't see why you object. THE WITNESS: A The vote was 600 for and 400 against.

MR. BEARDSLEY: 600 for and 400 against? A Yes.

Q The vote against this proceeding was the vote of the stock of whom? A The vote of the stock of my two sisters.

Q Mrs. Steele and Mrs. Kroenke? A Yes.

Q That represents forty percent of the stock of the Charles Jurgens Company, is that correct? A Yes.

Q Did you in your discussion with Mr. Cason of a possible reorganization plan for the Oakland Hotel Company, make any plan, did you discuss in any way the protection of the Charles Jurgens Company from its liability on the indebtedness of the Oakland Hotel Company, which is secured by its deed of trust? A No, sir, no occasion for it.

Q Well, did you not discuss is? A No, sir.

Q And your discussion of a plan with Mr. Cason contemplated then the treating of the Charles Jurgens Company and the Oakland Hotel Company as one, is that correct? A I did not quite get that. Q Did the plan of reorganization as suggested by you, as a result of your discussion with Mr. Cason. does it con- [353] template the treating of the

Charles Jurgens Company and the Oakland Hotel Company as one and the same corporation, so that the interrelationship between the two can be disregarded? A I don't think it would.

Q What did you mean by stating that in any plan of reorganization for the Oakland Hotel Comyany, it was unnecessary to pay attention to the fact that all of the Oakland real estate of the Charles Jurgens Company is put in trust to secure certain debts of the Oakland Hotel Company?

A According to the laws of the State of California, I believe stockholders are responsible for the debts of the corporation for the amount of stock they own, so we paid, by giving a deed of trust, or we secured the creditors of Oakland Hotel Company up to the amount of our stock, ninety-five percent.

Q Well, you recognized, did you not, that if the Charles Jurgens Company should pay any of that debt, or any of these debts of the Oakland Hotel Company, that the Charles Jurgens Company would have a claim against Oakland Hotel Company for the amount of the debt so paid; didn't you so recognize that? A According to law, I believe that is true.

Q And if the Charles Jurgens Company, in order to release its Oakland real estate from this deed of trust, should pay the $160,000 odd of debts secured by the deed of trust, you recognize that the Charles Jurgens Company would have a claim against Oakland Hotel Company for the $160,000

odd, plus interest and whatever was paid, do you not? A Yes.

Q Now, as a matter of fact, independent of the $160,000 odd which is listed here in the list of creditors as a contingent liability, the Charles Jurgens Company has a further claim against the Oakland Hotel Company of about how much? A For this 95 percent we paid.

Q You have not paid the 95 percent? A I understand—we secured. [354] We paid $10,000 or thereabouts. The Charles Jurgens Company has actually advanced to Oakland Hotel Company a considerable sum of money. Only one sister, Mrs. Steele objected to the advancing of any further money in 1931,—Mrs. Kroenke joined her in 1934.

MR. VAN FLEET: You mean joined with her in this last meeting.

MR. BEARDSLEY: Yes, in protesting against the further operation of the Hotel Oakland by the Oakland Hotel Company and Mr. Jurgens.

THE WITNESS: A I don't think their vote was a protest against that; they just did not want to do it.

Q They did not want proceedings taken for the purpose of putting you in operation of the hotel any further, that is it, and so expressed themselves, isn't that correct? A Yes, they did.

MR. VAN FLEET: But they did not protest against the petition.

MR. BEARDSLEY: Wait a minute, they voted "no" on the resolution.

MR. VAN FLEET: Very true, they did.

MR. BEARDSLEY: Q Now, Mr. Jurgens, you recall, do you not, how much money the Charles Jurgens Company has advanced to the Oakland Hotel Company, and how much it advanced prior to July 1933; well, we have segregated it, as a matter of fact, in the list of the creditors filed here, as being $7,200 advanced by you personally, Mr. Jurgens? A Yes. $147,500 advanced by the Charles Jurgens Company is principal and does not include any interest. I did not include the $7,200 owed by Hotel Oakland Company to me when I said it was unnecessary to take into consideration the indebtedness of the Oakland Hotel Comyany to the Charles Jurgens Company. In my discussion with Mr. Cason as to a possible reorganization of the corporation I did not take into account in any manner whatever, the principal indebtedness of $7,200 of Oakland Hotel Company to me, nor the interest accrued over the period of years. [355] It did not take into account, in any manner, shape or form, the principal sum of $147,500 owing by the Oakland Hotel Company to the Charles Jurgens Company, nor any interest on the $147,500.

Q Was that indebtedness of $147,500 and the interest accrued and accruing thereon, what you referred to when you said it was unnecessary to consider the indebtedness of the Oakland Hotel Company to the Charles Jurgens Company? A I don't think I said it was unnecessary; I said we did not discuss it.

Q I asked you with reference to considering some indebtedness between the Oakland Hotel Company and the Charles Jurgens Company. You said you did not because you thought it was unnecessary. Do you remember giving me that answer? You do, don't you? A No.

Q You remember having in mind there was some indebtedness there which you disregarded? A We did not discuss it, yes, we did not discuss it.

Q You recognize, do you not, that in any reorganization of the financial affairs of the Oakland Hotel Company, if will be necessary to take into consideration the indebtedness of the Oakland Hotel Company to the Charles Jurgens Company, do you not? A Well, I still come to the same answer I gave before, that could be a subject for discussion when the question of reorganization comes up with the creditors.

Q As a matter of fact, you told me a little while ago, you regarded this $158,400 of accrued bond interest that is secured by the real estate and equipment of the hotel, as being lost, it never could be paid. Did you regard, as a matter of fact, the $147,500 principal owing to the Charles Jurgens Company as being lost still further because it is unsecured?

MR. VAN FLEET: Objected to as calling for the conclusion of the witness. [356]

MR. BEARDSLEY: That is what I want, I want his conclusion.

THE MASTER: I think he can answer the question. We have gone pretty far afield in this matter since discussing the possible reorganization.

THE WITNESS: A Just as much as the bond interest is lost.

MR. BEARDSLEY: Q You realize that the bond interest is a secured claim, and the $147,500 owing to the Charles Jurgens Company is an unsecured claim, do you not? A Yes, I realize that.

Q When did we have the hoof and mouth disease? I think it was in 1925. The effect of that on the profits of the Oakland Hotel extended over quite a long time. It started in the spring and lasted well into the summer. It carried on, if I remember rightly, this is rather vague in my mind—but five or six months. It paralized business in the State of California. That affected the hotel business, affected us all very materially, It absolutely stopped travel. Some places in California did recover from its effects. I think it did in Oakland. The all-night ferries had their influence about the same time. I don't remember the date of the opening of the Hotel Leamington.

Q Can't you remember anywhere near it?

MR. VAN FLEET: Do you remember the date?

THE MASTER: Which hotel?

MR. BEARDSLEY: The Leamington.

Q Well, Mr. Jurgens, the Leamington Hotel is the second in size in Oakland, is it not? The Hotel Oakland is the largest in the city?

THE WITNESS: A Yes.

Q The Leamington is the second? A I think so; don't know the capacity of the Leamington.

Q That would be your guess, wouldn't it? A Yes. [357]

Q The second largest? A Yes.

Q It is a more modern hotel than the Hotel Oakland, it has been built since? A I would not say it is more modern.

Q Let's say "younger" if you prefer the term? A Yes, I want to get the distinction between the terms. I think the Leamington was opened in 1928 or 1929.

Q Somebody said 1926. A 1926.

Q Now, that has influenced the income of the Hotel Oakland, hasn't it? A Yes.

Q Now, the Athens Athletic Club was built in Oakland and has also furnished competition to the Hotel Oakland, has it not? A Yes. That opened in September, 1925. As a matter of fact the hoof and mouth disease, all night ferries and Athens Club and the Leamington hotel all came about the same time and all hit the profits of the Hotel Oakland,—they hit all the institutions in the city at that time. We still have a recollection of the hoof and mouth disease. I figure the bridge across the bay is going to be quite an advantage to the hotel; any community that increases its population also increases its business possibilities. With that increase in population and the desirabilty of living on our side of the bay, it is going to bring many

people over there. When the Commercial Club quit the seventh floor it ceased to pay the Oakland Hotel $1,000 a month, before the quarters formerly occupied by the Commercial Club were turned into living quarters. When we remodeled the seventh floor, they moved shortly before.

MR. LOUVAU: It was 1921 or 1922, if you will pardon me.

MR. BEARDSLEY: Mr. Louvau says it was in 1921 or 1922. It was before that they ceased to pay $1,000 and moved down to the lower floor and paid $500 and finally $250, in the quarters that Miss Brown says the Forum is now paying $150 for; that is [358] the same, that is the amount, isn't it? THE WITNESS: A Yes.

Q Now, referring to Mr. Jurgens, to the investment of the Charles Jurgens Company in stock of the Oakland Hotel Company, that stock was acquired over how long a period of time? A Quite a number of years.

Q Most of it was acquired by buying in the stock that was sold on account of delinquent assessments, was it not?

A No, sir. Q Some was, wasn't it? A Some was, but most was bought by direct purchase from the owner.

Q Mr. Jurgens, did the Hotel Oakland ever pay any dividends whatever to the stockholders?

A No, sir. The reason for that was very apparent. Our stock was seven percent cumulative after the first dividend was paid.

Q You never paid any dividend whatever to preferred stockholders, did you? A I did not pay a dividend to any stockholders.

Q It never has from the time the corporation was formed down to the present time. The Charles Jurgens Company, as stockholder, and the other minority stockholders, have never received a cent of any return upon their investment, that is correct, isn't it? A Yes.

THE MASTER: Q You figured that if you began paying dividends you would continue to have to pay them?

THE WITNESS: A They would accumulate so fast we could not keep it up. It was a peculiar way of fixing a stock certificate. It seemed to be very common at that time. They have since done away with it.

MR. BEARDSLEY: That is all.

RE DIRECT EXAMINATION

MR. VAN FLEET: Q Now, Mr. Jurgens, the property which has been hypothecated by the Charles Jurgens Company to protect [359] the tradespeople and the loan from the Central Bank, has been appraised at various times, has it not? A Yes, sir.

Q At one time it was appraised, in April 1926 at $844,000?

MR. BEARDSLEY: Just a minute. I think that would be entirely immaterial. If we are going

into the question of the value of property—

THE MASTER: I think, Mr. Van Fleet, I cannot see where that would be of any real value here. It shows that this debt is secured. It is to be assumed that this debt is amply secured when it was taken.

MR. VAN FLEET: I was just going to show the security.

THE MASTER: It will lead to a verp extended hearing.

MR. VAN FLEET: Well.

MR. BEARDSLEY: I assumed we would not have to go into the assets or liabilities of the Charles Jurgens Company

MR. VAN FLEET: We only introduced testimony in regard to the plan of reorganization anyway, to show there is a plan in view, that is all, to comply with the statute and satisfy the court, but I was going to suggest this: that if it is nesessary to carry out any plan of reorganization you still have the $308,000 of claims unsecured, and also your own stock to begin with, isn't that correct?

THE WITNESS: A Yes.

THE MASTER: Q That is, you mean some additional capital could be raised, if necessary, to carry out the plan; is that what you mean, Mr. Jurgens?

THE WITNESS: A Well, I don't know just about the capital part of it.

Q Well, resources? A Yes, sir.

MR. VAN FLEET: I think that is all.

RE CROSS EXAMINATION

MR. BEARDSLEY: Q Just explain how you mean additional re- [360] sources will be provided. I did not understand

THE MASTER: I understood that Mr. Jurgens had, his company had, additional resources that might be used to assist in the reorganization some way, if it could be agreed to.

MR. BEARDSLEY: I think if we are going to have anything of that kind we will have to take up the Charles Jurgens Company, and we have a division in stock there.

THE MASTER: Well, here is the view I am taking of this: I might as well express myself now since we have led to that; you have a proceedings here to dismiss on the ground that no possible reorganization can be effected. Now, I will express myself on the subject now. I think your evidence is all closed, is it not?

MR. VAN FLEET: Yes.

THE MASTER: I don't think this is a time to take this property away from the present receiver or trustee. I do think, however, if there is a possibility of any proposition being advanced that might possibly be agreed to by the bondholders, that that plan should be before the court, before the Court is compelled to decide on the question of the possibility of a reorganizaton. I have a case here that bears very closely on that subject.

MR. VAN FLEET: What do you mean, that

it should not be taken away from the trustee, do you mean the state court?

THE MASTER: I mean, taken away from the present trustee and handed back to your client at present. I am not deciding this thing now. I don't believe in keeping you in the dark as to what I am thinking. I think now if a possible plan of reorganization can be presented, you ought to be able to propose your plan. Then the question would be whether or not it could be accepted. Acceptability is one thing no one can conjecture. I undertake to say that counsel here are not in position to speak for these bondholders, because I am going to be compelled to hold that in this agreement those three stockholders Mr. [361] Beardsley represents are owners of those bonds because the agreement has ceased to exist. The only thing the committee has against those bonds is a lien on them for moneys advanced. Title to those remains in the parties that you represent.

MR. BEARDSLEY: You mean, the committee?

THE MASTER: I mean the committee, yes.

MR. BEARDSLEY: By the way, there are more than three.

THE MASTER: I think I will be compelled to hold that so far there is no showing here sufficient to, or showing sufficient at least to hold that these bonds are not secured by the property, that is, there is $1000 equity there over and above their security. That would put Mr. Beardsley in court, but it lets him out of court on the other proposition,

that is, he is not in postion as a representative of this committee to speak on that subject of whether or not a proposition that may be made would be acceptable now.

MR. BEARDSLEY: May I suggest there, I don't intend to speak for the committee, but I do speak for $387,000 out of $660,000 which is over a majority of the bonds. In other words, my six or seven creditors in number are owners of $387,000 out of $660,000, some sixty percent of the bonds.

THE MASTER: That may have a serious bearing on the subject then.

MR. BEARDSLEY: I just mentioned that.

THE MASTER: If course, I see now where a possibility of more resources being produced by Mr. Jurgens has a bearng on this. I am not inclined to go into the sufficiency of the resources of his company, because I know that is going to lead in a direction I don't think Judge Kerrigan ever intended I should go. It seems to me unless you appear in such a way that you can assure the court that your bondholders would not agree to any kind of a proposition that might be offered here—

MR. BEARDSLEY: I want to leave that contingency out. I want [362] to say we will not take any such position.

THE MASTER: I knew you were too fair to do that. The next question here is, there will be further testimony here, I should think, I want both of you to understand as far as I can what my inclination is as far as it goes in the matter of my

making a report to the judge. If you have any other testimony that bears on that, I will be glad to listen to it.

MR. VAN FLEET: We have no further testimony.

THE MASTER: You perhaps have further cross-examination.

MR. BEARDSLEY: No, I just want to conclude.

THE MASTER: I am not going to decide the matter without hearing from you fully, as fully as you want to be heard, and, Mr. Van Fleet, if I recommend that you be permitted to propose a reorganization here, I do not know how much time I should recommend that you have to do that. This matter is getting in shape so that in April there will be another tax to be paid, and really, in spite of all that has been presented here about the present management of the hotel and the former management of the hotel, there is nothing here on which I can base a ruling that this hotel can be made to pay until conditions change somewhat, but, on the other hand, there does seem to be some prospect based on some reason. I think conditions are looking up.

MR. VAN FLEET: As I understand it then, your holding will be that you will not dismiss this petition?

THE MASTER: I do not say that. I say that is my present inclination.

MR. VAN FLEET: Yes, but your holding will

be that the property be retained by the present trustee?

THE MASTER: It would be simply bad business to take the matter out of the hands of the trustee and back into the hands of Mr. Jurgens. It would simply be injurious to him in his efforts in trying to get a reorganization, it would require a [363] new system of accounting, possibly adjustment of the whole situation as far as employees and management.

MR. VAN FLEET: As I understand, your tentative decision—although we have been fighting bitterly here we want to work this out—as I understand, your tentative decision now, you will not dismiss the petition on their motion to dismiss.

THE MASTER: I don't think I will recommend that it be dismissed. I will say this, you will appreciate this: Mr. Wainright and Mr. Beardsley both say that they will not foreclose any negotiations here. What I am getting at is, I regret to say, gentlemen, that from a standpoint of an experienced business man I doubt very much whether you can work out the proceeding here. I think the recommendation as to time ought to be comparatively limited.

MR. VAN FLEET: That would be within your discretion.

THE MASTER: Not entirely, it is a matter of judgment that the judge will pass on in the end, but he would expect me to make a recommendation. Now, if you want to argue the question, I will be

glad to hear you, and I think you ought really to present some views on it. This is striking you rather suddenly taking snap judgment, but it has been my habit on the bench not to keep lawyers in the dark as to what I am thinking. It is not fair to do it. On the other hand, I don't think it is fair to decide anything until it is fully heard. I don't think a lawyer should be precluded by the inclination of a judge in speaking his own mind very frankly.

MR. VAN FLEET: As far as the legal argument goes, first, in this decision, if you decide not to dismiss the petiton, then the motion to dismiss will be denied.

MR. BEARDSLEY: I have not moved for it to be dismissed.

THE MASTER: The situation on the motion to dismiss here is anomolous too, If the matter is dismissed, the bankruptcy [364] courtmay take the matter over and administer it.

MR. BEARDSLEY: I think the trust deed provides that if the matter is dismissed, and there has been a state court receiver, it automatically goes back to the state court receiver.

THE MASTER: I think that might be so under some circumstances: under other circumstances it may be otherwise.

MR. VAN FLEET: He is asking that the petition be dismissed. That is the prayer in the answer. That is what he is arguing.

THE MASTER: He isn't arguing that now.

MR. BEARDSLEY: I have been trying to make a statement.

MR. VAN FLEET: Let me finish my statement here. Then, I understand that my argument that these creditors are not in court in any capacity, is no longer necessary.

THE MASTER: No, I don't think there is any escape to the fact that they are in court; under this evidence I think they have proved sufficient to show they are in court.

MR. VAN FLEET: Have they proved sufficient to show that the petition should be dismissed?

THE MASTER: I don't think so; but I have not heard from Mr. Beardsley on that matter, or the other gentlemen. They may convince me otherwise. There is the situation, and it is four o'clock. Think this over and come in tomorrow, if you wish, or postpone it to the next day, but I prefer to have it tomorrow.

MR. VAN FLEET: Just a minute, I think he ought to defer this matter. You have told us what the report will be.

THE MASTER: No, I have not. I have only told you what I think it will be.

MR. VAN FLEET: We should defer it until you make a draft of the report.

THE MASTER: No, I prefer to have the matter fully discussed [365] and decide it.

MR. VAN FLEET: Would you rather discuss it after the record is written up?

THE MASTER: The only chance of doing that

will be to postpone the matter until after I return after the 3rd of January if you cannot argue it in the morning. If we can have argument tomorrow, I will make the report up before I leave. Mr. Van Fleet, there must be the utmost diligence shown in the matter. I am not inclined to put it over ten days or two weeks further and then have you go a considerable time after that. If there is to be a compromise it must be proposed soon; if it is not the creditors won't accept it. I can see that plainly from the statements of these gentlemen.

MR. BEARDSLEY: There are two things I want to say. Number one is, we paid the taxes today.

THE MASTER: There is no question of your right to do so.

MR. BEARDSLEY: I got an order from Judge Kerrigan and paid the taxes today; that is out of the way.

THE MASTER: Until April.

MR. BEARDSLEY: And we will have enough money, if let alone, to pay the April taxes. Number two is this: I am going to speak my sentiment, and I think I speak the sentiment of the bondholders whom I know I appear for, and so far as the bondholders generally are concerned, I think their sentiment is fairly unanimous. In other words, we have here on deposit eighty-seven percent of the bonds, notwithstanding the fact that the bondholders agreement expired eighteen months ago, not one bond was withdrawn, which shows the unanimity

of opinion in regard to the management, formal and informal, of the bondholders committee. We have $387,000 face value of bonds answering here. The only reason we have that instead of a larger amount [366] that we simply took five or six of the largest bondholders and it was easy to contact them rather than contacting 300 or 400, that is the only reason. Now, as far as the proposition of insisting on the dismissal of this petition, I realize the procedure is uncertain. All that I am interested in here is having this matter over with, organize or no organize, and give an opportunity to save as much as we can for the secured creditors; that is what I am trying for because I think they must be considered first. As a matter of suggestion as to whether you should give a short time, a reasonable time to present a reorganization plan, I am not going to quarrel with any views the Master has. I use that term figuratively. Mr. Green will concur with me. It does not make any difference to us whether this petition is dismissed, I mean, whether you recommend its dismissal, or whether you recommend that the debtor be given a time that may be suggested, a reasonable time to present a plan to determine whether or not it is to continue further. In other words, I have no objection to the debtor's presenting a plan; if the Charles Jurgens Company or anybody else can say they can come up here and make any kind of substantial protection for these bondholders that have been long suffering, I say that we have been long suffering, or we would have

foreclosed this property three years ago. We are willing to hear it, but we want to hear it quickly. In other words, we have sat by for three and one-half years and we have suffered with this property, we worked for it. Personally I have not had a cent, and I worked for it, and my deceased partners have worked for it, Mr. Wainwright, Mr. Kinney and Mr. Soule, representing the largest owners have worked, they have not had a cent, they don't charge anything. Mr. Barker has run the hotel, and he got $250 a month up to the [367] time he ceased to be a receiver, and that is all. Now, we say, that having sat by for three years and longer, while we have been trying to make these bonds worth a little more than thirty cents on the dollar, that if they have got anything to say about saving us, for God's sake say it and get it over, and if they haven't get out of the way, and let us finish up the job we started three years ago. I did not intend to make a speech, and I apologize, but I want to express that sentiment because I think it will simplify the matter of argument. Mr. Green, is that your sentiment?

MR. GREEN: Absolutely.

MR. BEARDSLEY: So, as to whether you should dismiss, or give them a chance to present a plan in a short time, I am not going to argue that unless you want me to, because I feel satisfied with either one. Is that your attitude, Mr. Wainwright, representing the bank?

MR. WAINRIGHT: It is.

MR. GREEN: It is.

MR. KINNEY: It is.

MR. SOULE: It is.

MR. BEARDSLEY: Mr. Soule owns $69,000 of these bonds. The Central Bank owned $18,000 and $48,000 in its own right, and the Crocker-First National Bank owns, represented by Mr. Green and myself as attorneys, $70,000 besides the trusteeship. We are willing to be satisfied, but we want to be satisfied. We don't simply want to be postponed while taxes and interest and the toredos eat it up, what is left.

MR. VAN FLEET: That is all very agreeable to me, if your Honor please.

THE MASTER: That simplifies the matter. [368] I want to say this for the benefit of every body here. These matters are business matters. Mr. Van Fleet, these bondholders have been very forbearing here, they could have sold this thing out right away, without difficulty, under their deed of trust. They did not do it. The truth of the matter is that creditors in these matters, except sometimes when racketeers get hold of a large faction, have been just what these creditors have done; they have been forbearing and have tried to give you a chance to work something out. I cannot help feeling there is a limit to patience. They are people who own bonds like these who really need this income and need it badly. I will say right now, personally I am on this bench at work because money

I worked for during my forty years practising law has shrunk so completely, and money invested on the advice of people who sincerely thought they knew what they were doing. There are others like that. That is the reason I will make this report just as promptly as I can make it. If you don't care to argue further, I will make the report tomorrow and send it to the judge for recommendation. I will be glad for you to take it up tomorrow as the time I should give you within which to present your plan.

MR. VAN FLEET: Very good. Then, as I said before, all legal argument is unnecessary.

THE MASTER: It has worked itself out.

MR. VAN FLEET: I just want to serve my mind. It will be the holdng of the court, in the meantime, until the plan of reorganization is worked out, the present trustee remains?

THE MASTER: The present trustee remains just as he is now precisely.

(Adjourned to December 19, 1934, 9:30 A. M.)

[369]

[Printer's Note: Transcript, portion beginning with line 1, page 375 and ending with line 9, page 376, designated by Appellees to be printed.]

MR. WAINRIGHT, called for the creditors and sworn, to Mr. Beardsley: I am the Vice-President of Central Bank of Oakland and was chairman of

the bondholders committee in the Oakland Hotel matter. It is correct that there are on deposit with the Central Bank of Oakland as depositary under the bondholders agreement, as set forth in the creditors' opposition to the reorganization plan, verified by me, bonds of the face value of $483,000, deposited under that agreement. I have the names and addresses in the bank of the depositors of those bonds, and the bonds, themselves. Since then there have been some additional bonds given to the Central Bank for safekeeping in which I have the names and addresses of the holders and depositors of the bonds. One lot of $10,000 was deposited within the last week and since this hearing started, there have been a number of others who have deposited. We have no definite information or knowledge as to these others, as to where they reside, as far as the owners of the bonds other than those that have deposited with the Central National Bank either under the bondholders agreement or for safekeeping, or their ownership. It is correct that under this creditors' opposition referred to, it is set forth that the answering creditors are the owners of $385,000 face value of the $660,000 bond issue. That the situation with reference to the list as prepared and filed is of bondholders that were taken from the depository list as I have it of the bonds on deposit with the Central Bank, is correct, and with the names and addresses I have here. I was informed by Mr. Louvau, as far as the other creditors of Oakland Hotel Company, those names and addresses and

amounts were taken from the books of Oakland Hotel Company in the preparation of that list, as at the time that list was made he was an officer of the Hotel Company. It is correct that you have all the names and addresses of all other creditors as listed in the list and the [375] names and addresses of all stockholders as taken from the records of the Hotel Company.

WITNESS TO THE MASTER: Most of the creditors are trade creditors of the Oakland Hotel Company who supplied merchandise while the Oakland Hotel was operating. I would say, possibly without exception they are all in San Francisco or Oakland I could not say that the bank sold many of these bonds because I was not with the bank when they were sold. We are the owners, ourselves, of $148,000 of the $660,000.

[Printer's Note: Transcript, portion beginning with line 14, page 376 and ending with line 17, page 377, designated by Appellees to be printed.]

THE WITNESS: We have the list that was the original list of the Crocker First Federal Trust Company, who are the trustees under the trust indenture. From that list we can pick out those we assume own the bonds that are not deposited. They would get notices under this agreement. Those bonds are scattered around fairly well. There are some, if I remember rightly, back in Boston, with

one of the banks back there. The bonds are scattered; the trade creditors are not.

ON CROSS EXAMINATION — MR. VAN FLEET: I don't know if this is particularly proper, but I would like to know for our own information: These people up North, the Western Hotel Company, negotiating with Jurgens, they claim to have paid $200,000 for the bonds. Is there anything in that? A. That I don't know. I know the bonds, $583,000, are still on deposit in our bank. I checked it at 4:30 last night. There is no option now for the sale of those bonds that I know of.

THE MASTER: Where are the Western Hotel people?

MR. VAN FLEET: Up in Seattle.

MASTER TO THE WITNESS: Can you give us their exact address? [376]

WITNESS: A. They are not the owners of any of these bonds, but we can send them a notice.

MR. VAN FLEET: I have the address.

THE MASTER: Q. Have you any other list?

THE WITNESS: A. The Western Hotel Company have a representative here now. That is, a broker, right in Oakland today. He was in contact with us yesterday.

MR. BEARDSLEY: He was present at one of our meetings.

THE WITNESS: I would see to it their name is put on this notice of hearing.

THE MASTER: Q. One other question. Do you know the stockholders of the Oakland Hotel Company. A. Yes.

MR. VAN FLEET: We have that.

WITNESS TO THE MASTER: They all live in Oakland, the Jurgens family.

THE MASTER: That is correct, is it, Mr. Jurgens?

MR. JURGENS: Yes, your Honor.

[Printer's Note: Transcript, portion beginning with line 4, page 383 and ending with line 8, page 383, designated by Appellees to be printed.]

THE MASTER: I will go upstairs. If you come up right away, Mr. Gregory, I will give you an order right away. Meantime this matter will be continued to what date?

MR. BEARDSLEY: June 3, 1935, ten A. M.

THE MASTER: All right; adjourned to that time;

[Printer's Note: Transcript, portion beginning with line 18, page 383 and ending with end of transcript, page 403, designated by Appellant to be printed.]

MONDAY, JUNE 3, 1935. 10 A. M.

APPEARANCES:

Carey Van Fleet, Esq., for the debtor;

Messrs. Chickering & Gregory, by Mr. Gregory, for the Bondholders Committee;

Messrs. Fitzgerald, Abbott & Beardsley, by Mr. Beardsley, for Certain Creditors;

Bernard Silverstein, Esq., for E. C. Street, Trustee in Bankruptcy of Wood Bros.

THE MASTER: Well, gentlemen, what is the state of this matter?

MR. VAN FLEET: The claims have been filed.

THE MASTER: When did the time for filing claims expire?

MR. BEARDSLEY: On the 31st.

MR. VAN FLEET: I have not had a chance to look through them yet. Only one thing there would be a question about is the claim filed by Wood Bros. I understand for $120,000; Wood Bros, who were [383] the lessees at one time.

MR. SILVERSTEIN: A claim filed by E. C. Street, trustee in bankruptcy for Wood Bros, as the value of the unexpired lease between Oakland Hotel Company, originally entered into with Oakland Hotel as lessor and Wood Bros. as lessees and the lease was afterwards assigned over to Wood Bros. a corporation, when the corporation was formed. The lease runs from—the lease, by its terms, expires August 10, 1956. The amount of $120,000 is fixed as the value of the unexpired term and is based upon the provisions of the lease itself, which provides that the lessor had the right to cancel the lease within certain periods upon the payment of certain amounts of money, and I take it that would be the value of the unexpired term as fixed by the terms of the lease itself and that is

the basis upon which the $120,000 was arrived at.

THE MASTER: Is the lease attached to the claim?

MR. SILVERSTEIN: No, I did not attach the lease to the claim, but the lease was recorded.

MR. VAN FLEET: The lease is in evidence. We put it in evidence.

MR. SILVERSTEIN: It was recorded in Alameda County.

THE MASTER: Is it in evidence now in this proceeding?

MR. VAN FLEET: Yes, I think we put it in evidence.

MR. SILVERSTEIN: The copy of the lease we had is in evidence in another proceeding in Alameda County, but I have copies of the lease in my office that I could attach to the claim if necessary.

MR. VAN FLEET: But, as I understand it, the lease provides if they go through bankruptcy, it is cancelled.

MR. SILVERSTEIN: If who goes through bankruptcy?

MR. VAN FLEET: Wood Bros.

MR. SILVERSTEIN: Of course, that may be a question there. I don't know. [384]

THE MASTER: Is it Wood Bros. that is in bankruptcy? The trustee in bankruptcy for Wood Bros. is presenting the claim?

MR. SILVERSTEIN: Yes.

MR. VAN FLEET: Now, the other claims I have not gone through.

THE MASTER: I will ask this question: Has the statute been fulfiled in other respects so as to get this matter up to consideration at this time?

MR. BEARDSLEY: I understand so. The order was made for the time within which claims might be evidenced. That time expired on the 31st and the hearing on those claims and the hearing on the other matters before the special master in the approval of the reorganization plan, dismissal of proceedings and so on was regularly continued to this date.

THE MASTER: Is the plan of reorganization on file?

MR. VAN FLEET: Yes.

THE MASTER: Now, has it been accepted in writing as provided in the statute?

MR. VAN FLEET: It has not been accepted, no.

MR. BEARDSLEY: For the claims of bondholders on file, filed in accordance with the order made after the last hearing, there are claims of all of the bondholders whom Messrs. Chickering & Gregory and Messrs. Fitzgerald, Abbott & Beardsley represent in the answer heretofore filed and the opposition filed, amounting to $387,000 face value out of the $660,000 face value of the outstanding bonds.

THE MASTER: How many outstanding?

MR. BEARDSLEY: $660,000. At the present time, there are on file in due form, claims of bondholders to the extent of $411,000 out of the $660,-

000, all of which bondholders filing $411,000 have filed in their claims, powers of attorney running to Chickering & Gregory and Fitzgerald, Abbott & Beardsley, authorizing those two firms, or either of them, [385] or the representative of either firm to vote and act for the claimants in any reorganization plans. And, Chickering & Gregory and Fitzgerald, Abbott & Beardsley, representing the $411,000 of face value of these bonds besides interest, vote no on the reorganization plan that is on file. In other words, we refuse to consent to the reorganization plan and that refusal is expressed by $411,000 face value of $660,000 bonds outstanding. How many of that $660,000 are on file, I do not know, but a comparatively few in addition to the $411,000 which have given powers of attorney to those two firms.

THE MASTER: Is the acceptance on file on behalf of the stockholders?

MR. VAN FLEET: No.

THE MASTER: Have you taken any steps at all.

MR. VAN FLEET: No. I tell you the reason, your Honor, that we cannot submit that for this meeting. I don't think this is a final reorganization plan under the Act. Since this postponement, we have been very busy and we have taken the matter up with the Reconstruction Finance Corporation and the Reconstruction Finance Corporation became very much interested in the matter and has even said that if we could get the consent of

the majority of bondholders and the controlling bondholders to accept a certain cash amount for their bonds, that they would—they did not commit it—but they would examine it and if they thought the Oakland Hotel Property was sufficient security, they were interested to the extent of recommending it; that they would recommend the loan to the United States Government. So, that being so, we interviewed Mr. Mount and on the suggestion of the head of the local Reconstruction Finance Corporation, Mr. Kinney in regard to what amount they would take for the bonds. I suppose I suppose there will be no dispute about it. Then they told Mr. Jurgens at the bank, Mr. Kinney, one day, he would recommend [386] $400,000 to the bondholders and Mr. Mount said—they can dispute me if necessary—he would follow the recommendation of Mr. Kinnep. So, then we called a meeting before the Reconstruction Finance Corporation and gave a notice to the Central Bank of Oakland and the Crocker First National Bank, Mr. James K. Moffitt, and I wrote this letter, stating the facts, which I will put in evidence at the proper time, and accompanied with a notice, upon the recommendation of Mr. Calkins, that there would be a meeting in the offices of the Reconstruction Finance Corporation, Room 720 on May 8th, asking them to have representatives there and at that time Mr. Gregory and Mr. Green appeared as representing the majority of bondholders and at that time they thought it was another move to delay

on my part, and I agreed at that time that I would not ask for any continuance of this hearing at all on June 3rd, but unless they agreed in the meantime, I would bring it to the attention of the Court as a modification of the reorganization, and then the Reconstruction Finance Corporation told us to proceed to make application. Well, when we went down to make application, they said they would like to have the committment of these people in writing, so I went back to Mr. Kinney and stated the facts and he wrote a letter to me, which I will hand your Honor.

THE MASTER: Read it.

MR. VAN FLEET: "Mr. Carey Van Fleet, DearSir: "After Mr. Jurgens and yourself called on me last Friday in reference to the affairs of the Oakland Hotel Company, and with particular reference to the possibility of your securing a loan from Reconstruction Finance Corporation, with the proceeds of which to compromise the claims of the bondholders, I discussed the matter with our attorneys and with other representatives of the bondholders.

"The proceedings pending under Section 77B present an [387] obstacle to discussions of compromise. As long as these proceedings are pending we are not in a position to deal with you upon an equal basis, since you are free to continue with these proceedings and to impose additional expense and hardship upon us if we do not agree with your terms. If you desire to discuss a possible compromise, we

feel that the pending proceedings should be dismissed. If you do not desire to dismiss these proceedings, we feel that the hearing set for June 3 should continue without delay to the end that these proceedings may be terminated by final court decree.

"I think it is appropriate that I should suggest further that as long as the litigation is pending in the Federal Court, in which litigation we are represented by attorneys, if there is to be any further discussion in reference to that litigation or in reference to matters incidental thereto, that discussion should be carried on with the attorneys. Yours truly, R. W. Kinney".

And here is the letter I wrote Mr. Mount:

"In reference to the Oakland Hotel reorganization proceedings now pending, Mr. Jurgens and Mr. Van Fleet had a conference with your president, Mr. A. J. Mount, recently. At this conference we told him that Mr. Jurgens had some assurances of a possible loan on the hotel property which would enable him to pay a substantial amount to the bondholders for their claims. Mr. Mount suggested that we put the offer in writing and it would receive full consideration. Our statement was based upon the following circumstances:

"Mr. Jurgens has been serving with the hotel code authority in Washington. He was recently informed by his friends there that the Reconstruction Finance Corporation has formed a new unit, the R.F.C. Mortgage Company for the loaning of

money to hotels, business and office buildings, etc., where [388] financing is necessary and loans cannot be obtained upon reasonable term. They suggested that he take advantage of this measure. Mr. Jurgens stated to them the actual condition of the Oakland Hotel Company and these associates of Mr. Jurgens urged him to make application for the loan. What gave weight to the advice was the fact that they are associated with the R.F.C. To this end, therefore, we have taken the matter up with the local office of the R.F.C., who received the matter favorably. We intended to make a direct offer to the bondholders through you and their other representatives. We were advised, however, by Mr. Calkins of the local R.F.C. that the best way to proceed was to ask you and the other representatives of the bondholders to enter into preliminary conferences with him with a view to ascertaining just what the bondholders would be willing to take either in cash or in cash and stock of the hotel company. Mr. Calkins told us he stood ready to have a meeting around the table at any time or place that was agreeable to all concerned. The next hearing in court is on June 3rd by which time all claims should have been filed. They must be filed by the 31st of May. We should push this matter to a head before that time so that it can be taken up with the court. We have already filed a proposed plan of reorganization which does not seem agreeable to your people, mainly, we suppose, because we have not offered any cash. The court

has ordered a reorganization. It will, look with favor upon any bona fide attempt to properly protect the debtor and the creditors and will give the opportunity to the debtor as long as the debtor has been diligent. But you have your own attorneys. You may communicate with them.

"Since writing the above, Mr. Calkins has suggested that the date of the meeting acceptable to him would be Wednesday, May 6th, at ten o'clock, A. M., in Room 720, 7th Floor, [389] Federal Reserve Building, San Francisco, California."

The matter came about in this way: In February of this year, they formulated the Reconstruction Finance Corporation for the purpose of lending money to hotels, apartment houses and other businesses and under that new unit of the Reconstruction Finance Mr. Jurgens was advised by a friend of his with the Reconstruction Finance in Washington to make application for a loan, and so. the condition was, of course, he could not make application for a loan with this bond issue standing out against it, and also he has to pay the full amount of the taxes and some expenses. The Reconstruction Finance Corporation, if it grants the loan, is willing to pay the expense of the attorneys in this matter, the expense incurred in this proceeding, because they are really a lien against those bonds, so they wished to put in a certain amount for the taxes, which have to be paid, and then if the bonds could be scaled down, we could make application for a loan of $500,000 and if the set-up

were proper, they would recommend it. They were very much interested. They asked Mr. Gregory what his people would do. He said he was merely there as an unofficial observer; he would not commit himself in any way. This is not for the purpose of delaying this proceeding. I leave it up to your Honor. And, going back, I wrote down what happened at that time. (reading)

"Meeting was held before local Reconstruction Finance officers on May 8, 1935, at the hour of ten o'clock A. M. in the Federal Reserve Building. There were present: Mr. Calkins, Mr. McCullough and Mr. Like of the Reconstruction Finance Corporation, Mr. Van Fleet and Mr Jurgens for the Oakland Hotel, Mr. Gregory and Mr. Green for the Crocker Bank and the Central Bank of Oakland. Mr. Gregory stated that they were there as unofficial observers merely to extend to Reconstruction Finance the courtesy of their presence, that if the Oakland Hotel wished to make an application to the R.F.C. it was alright, but they [390] would make no offer one way or another, (that is, no offer on the bonds) that the Debtor had chosen to go into the Bankruptcy Court to delay matters; that the present application was only for purposes of delay.

"Mr. Van Fleet stated that they were there at the suggestion of Mr. Calkins to ascertain what arrangement could be made with the Bondholders in cash and stock in case the government would make a loan to the Hotel Oakland.

Mr. Gregory said the company had made one proposal of reorganization which would come up on the 3rd of June which they considered ridiculous and they hoped to have the proceeding dismissed at that time.

"Mr. Calkins stated in substance that the fight in court was of no interest to him, but he was there in a helpful capacity to see if anything could be done to satisfy the bondholders and put the hotel on its feet as he took some pride in Oakland in the hotel and as it was his duty as the representative of the government. He made no promises, but he stated to Mr. Gregory and Mr. Green that the bondholders should consider some plan in which the government could help, that he thought some plan could be evolved. That the bondholders should approach the matter in the same spirit in which he himself approached it and forget all bickerings. "He then proceeded to ascertain as a basis of agreement what the bondholders considered the value of the property. Mr. Gregory fixed on the figures of Kittrell which were $525,000. Mr. Van Fleet fixed the valuation of the debtor at $1,500,000, based upon the insurance appraisal and the value of the real estate which had some relation to the value of the postoffice site which was sold to the government for $500,000 in round numbers. Mr. Calkins then asked if any offer had been made by the bondholders. Mr. Gregory stated none had been made. Mr. Van Fleet showed by documentary evidence that two such offers had been [391] for

$400,000 clear to the bondholders. Mr. Calkins said then we have something to go on. He stated to the representatives of the banks that they should make some effort to ascertain what the bondholders would take, the irreducible minimum, and that the proper spirit should be shown. Mr. Gregory and Mr. Green promised to report to their people. Mr. Calkins stated that although one reorganization plan had been proposed there was no reason it could not be changed, that although in the end the bondholders might get the equity or might not, it behooved them to make some attempt to arrive at an agreement at this time."

Then the next thing was the statement by Mr. Kinney in the letter and so the matter stands. In view of that position—there is no attempt to delay —as you can well see, in this matter although you may recommend the rejection of the plan which has been proposed, this is a plan in which the Reconstruction Finance Corporation will take over the reorganization of the property under the Court if Mr. Jurgens can give them that opportunity. Under these circumstances, I don't think any court would dismiss the case until an opportunity has been given. You might recommend a liquidation until this matter can be threshed out.

I brought them here this morning to see if they would make any offer in Court at the present time so we could go ahead with that, we would go ahead in a very short time before this committee. Of course, if we fall down before this committee, there

would be nothing more to it. Mr. Beardsley was away at the time. Anyway, I communicated with all of his clients and a lawyer was there before the Reconstruction Finance Corporation.

MR. BEARDSLEY: The position of the Bondholders we represent is simply this, we are here on a proposed plan of reorganization that the debtor asked leave to file and did file. [392] We think this proceeding should go ahead to a determination of whether or not this plan or reorganization should be approved. If not approved, the statute provides that the Court has three alternatives: It can permit the filing of a new plan of reorganization, or it can dismiss the proceeding, or it can hold the estate for liquidation in the Bankruptcy Court. It is our position the proceeding should be dismissed. If it is possible for the Oakland Hotel to refinance through the aid of the Reconstruction Finance Corporation, a proposal of that kind can be worked out much more feasibly and satisfactorily without an adversary proceeding as this is, with the threat of continuance after continuance, to go to the Supreme Court of the United States, things of that kind on procedure. It is our idea, if there is money forthcoming that can satisfy the bondholders it could be worked out without this proceeding pending, which is adding additional expense and delay to the bondholders. We are here on this proceeding, as I understand, with the understanding there would be no request for further delay and we would have the matter dis-

posed of at this time. The position, generally, of the bondholders is the position stated in the letter from Mr. Kinney to Mr. Van Fleet. Personally, I dictated the letter.

THE MASTER: How many bonds have been filed?

MR. BEARDSLEY: I have not counted them all. There are $411,000 with powers of attorney.

THE MASTER: You gentlemen represent those?

MR. BEARDSLEY: Yes and we have filed a few additional ones that came into us without power of attorney attached.

THE MASTER: There are $249,000 then which you do not represent?

MR. BEARDSLEY: Yes, but they are not on file.

THE MASTER: Not all on file, no. I don't know how many are on file.

MR. BEARDSLEY: But, as a guess, would say not over $20,000 additional on file at this time. We filed, I think, probably [393] that.

MR. BEARDSLEY: The Oakland Hotel matter started in January, 1932 with the suit of the trustee under the bond issue to enforce the terms of the bond issue, giving the trustee the right to possession by reason of the default by the Oakland Hotel, and as a result of that suit, in that suit, Henry Barker was appointed receiver to carry out the right of the trustee under the bond issue; he was in possession as receiver from January, 1932 until October, 1934, when he was succeeded by

Henry Barker as trustee under this proceeding pending in this Court.

MR. VAN FLEET: My theory of the Act is, it does not mean one reorganization or nothing.

THE MASTER: That is true, Mr. Van Fleet. On the other hand, the next move is yours. You can see how these people have been kept out of their security for over three and a half years; you see it is a long time. You have nothing really definite, that I can see, to offer.

MR. VAN FLEET: This is very definite, as a matter of fact. Why don't they give us the opportunity? Why do they object to making a statement of what they will take for the bonds? They already said they will take $400,000.

MR. BEARDSLEY: I want to correct that. That is not true. Mr. Van Fleet knows it is not true. The statement is in writing. He has repeatedly made that statement. We made no such statement. There is a letter from Mr. Kinney stating that before this proceeding was started at all, he would recommend to the bondholders the acceptance of $400,000 net to the bondholders. That was six or seven or eight months ago, but he had no agreement to take $400,000; no one was authorized to make such an agreement. As far as the matter stands at the present time, neither Mr. Gregory myself nor anyone else in the courtroom is in position to say what the bondholders will take for the reason that no one here [394] is representing the bondholders or all the bondholders. We do not

know what the bondholders would take. We do know for the larger bondholders, the Central Bank of Oakland and the Crocker First National Bank, something about what their idea is of what they should get out of these bonds, but they are not all of the bondholders and no one has presented to make any offer of what the bondholders would take and statements of that kind to the contrary notwithstanding, it was not made and counsel knows it was not ever made.

MR. VAN FLEET: Well, it doesn't make any difference. I will ask Mr. Kinney to take the stand.

THE MASTER: Let us see what our ratios are here this morning.

RALPH W. KINNEY,

Called for the Debtor, SWORN

THE MASTER: In the first place, there is no plan of reorganization on file that has been approved by the requisite number of creditors, is there?

MR. VAN FLEET: That is correct.

THE MASTER: And this matter was continued for sixty or ninety days in the first place for the purpose of giving you a chance to get such plan, and then continued again for the purpose of having the jurisdictional question settled by the moving creditors and giving them an opportunity to file their claims. The claims have not been checked, so I do not know exactly what proportion are on file. One claim on file is being objected to.

That claim is an unsecured claim. The necessary number of bondholders that must be secured in order that the Referee can recommend to the Court an approval of the plan or confirmation of the plan is two-thirds and Mr. Beardsley and Mr. Gregory say that they have not agreed to the present plan of reorganization and there is no other plan on file. Now, Mr. Van Fleet thinks there is a possibility he could secure money from the Reconstruction [395] Finance Corporation. On a mere suggestion that he might be able to secure money, made I think sometime last January or at some hearing we had here earlier in this proceeding, and a suggestion that came from Mr. Jurgens, I continued the matter for a long time in order to give Mr. Jurgens an opportunity to see what he could do in the matter. If there were any committment here to any particular amount or distinct recommendation to the Reconstruction Finance Corporation or its subsidiary organizations to actually lend the money, that it would lend any particular amount on this property, then there would be something for Mr. Beardsley and Mr. Gregory to take up with their clients.

MR. VAN FLEET: That cannot be done until they agree what they will recommend to the bondholders.

THE MASTER: I can see how the recommendation should come from them necessarily. Can see why they should not be placed in the position where they would be prejudiced in the minds of some

court far away from here by saying they would take a certain amount of money. It seems to me, with the Reconstruction Finance Corporation's opportunity to estimate the value of this property and their knowledge of what they lend on properties, they should say what they would lend; Mr. Gregory and Mr. Beardsley say, "We will take two-thirds of this amount" and then have the matter go before the Court and say, "We insist on taking two-thirds." There is always the question of what the Court can force on these bondholders. I am not inclined to force them into a position to do that. I will not tell them they must make an offer to you. You see, you are the person here who is to put up the plan of reorganization; you put one up; that has been rejected, it has not been approved at least. Now, you have no other plan to offer.

MR. VAN FLEET: I just stated a plan. Well, let it go at that. I won't argue with your Honor. I want to put this in evidence. [396]

THE MASTER: I was going to say what I consider the issue here. The issue you are presenting now is one I suppose would appeal to the discretion of the Court as to whether you should be given more time to propose an amended or new plan. That is the issue as I understand it. That must be a sound legal discretion, not an emotional feeling, I judge, that anybody should be given more time.

MR. VAN FLEET: Q Mr. Kinney, didn't you state to Mr. Jurgens in the presence of Mr. Moffitt a couple of weeks ago that as far as you were con-

cerned, you would recommend to your bondholders the acceptance of $400,000 for their bonds now?

THE WITNESS: A. I did not.

Q. What did you state to him?

A. Mr. Jurgens in his conversation with Mr. Moffitt made the statement that Mr. Wainright and I had offered the property for $400,000 and I said to Mr. Jurgens: "When you quote us, please quote us correctly." Mr. Robbins has made that statement before. We never made such an offer. We did submit a proposition in writing to certain parties, that if they would take over for $400,000, we would take it up with the bondholders. That is as far as our authority went. Mr. Jurgens asked if we would not have recommended it. I said we might have even recommended it, but we made no such offer.

Q. Didn't you say anything about an offer? Didn't you say you would recommend it to the bondholders, the $400,000?

THE MASTER: That is exactly what Mr. Beardsley says:

MR. VAN FLEET: I am asking if he said it now.

THE WITNESS: A. I did not. We were not discussing that. We were discussing the offer Mr. Wainright and I made in writing.

Q. You were not discussing what you would do at the present time?

THE MASTER: Q. Were you referring to the offer you made in this letter you wrote Mr. Van Fleet on May 27th? [397]

A. No, there is a letter in evidence. It is the best evidence.

MR. VAN FLEET: It is not in evidence. I will give it to your Honor right now.

THE WITNESS: A. Some nine months ago that we wrote it.

MR. BEARDSLEY: A letter to a prospective purchaser.

THE MASTER: No letter of that kind would bind anybody anyhow.

MR. VAN FLEET: I did not say it would bind them. I don't say it is binding. The gentleman came to us and tried to buy out Jurgens' equity on the theory that it was binding and I said it was not binding. I say they have offered the bonds. I understood from Mr. Jurgens the other day that he said he would recommend it again. Now he says he did not say that.

THE WITNESS: A. I have absolutely no authority in the matter as you and Mr. Jurgens both know.

THE MASTER: Have you seen this letter?

MR. BEARDSLEY: I think I have.

THE WITNESS: A. Our time expired last fall.

MR. VAN FLEET: Since then Mr. Wainright has been writing to the hotel authorities as chairman of the bondholders' board. However that may be, you are still a *de facto* bondholders committee.

THE MASTER: Well, this is quite a complicated proposition here made on June 22, 1934, a

year ago. I won't stop to read it all. However, in the opening paragraph Mr. Wainright evidently keeps himself in the clear, because he says, in submitting the agreement, "It being clearly understood that the decision to accept or reject lies entirely with the Bondholders." Then he goes on with the proposition here, which is quite a complicated proposition, apparently to sell the real estate and not to sell the bonds.

MR. VAN FLEET: To sell the whole hotel.

THE MASTER: So, that was an offer to sell the real property.

MR. VAN FLEET: May I have that in evidence? [398]

Q. Now, isn t this a copy of the letter you wrote to Mr. Casson?

THE MASTER: I don't think there can very well be a claim this committee misled your people or anybody else. They have been trying their best to get possession of the property for three and a half years.

MR. VAN FLEET: Sure they have. As a matter of fact, the delay comes from the 77-B proceeding, which everybody objects to from the very beginning and they want to dismiss. I have had to fight.

THE MASTER: You have done very well. I am certain that it should not have been dismissed on its face. If I was the Federal Judge, I am not certain I would not have worried a lot before not doing that.

MR. VAN FLEET: Q. Is that a copy of the letter you wrote?

THE WITNESS: A. It looks like it.

MR. VAN FLEET: Well, it was about the time of the beginning of this proceeding; just before. We did not use it at the time, because it was more or less confidential. Now, if your Honor please, I don't want to argue this to any extent, but as I said before, there is an opportunity here and I think any court in the world would give that opportunity. Your Honor might disagree with me.

THE MASTER: How long will it take you to foreclose this property if this matter is dismissed? Is this foreclosure in court or is it a sale under the trustee?

MR. GREGORY: If your Honor please, the title company has informed us they estimate three or four months.

THE MASTER: I am not at all certain Mr. Van Fleet would not be in a better position if the matter were dismissed. He would have four months, whereas, if we liquidate the matter—I am not deciding now I am not going to give you more time—if we [399] liquidate the matter, the result would be we could sell in a short time in the Bankruptcy Court.

MR. VAN FLEET: I think the Bankruptcy Court, though, would take cognizance of this proceeding.

THE MASTER: I am not inclined to order a liquidation under any circumstances. I would

recommend one of two things: That you be given more time or a dismissal. If there is a dismissal, the State Court would take it up and deal with it. It is quite competent to deal with it in the proceeding under way there. I see no reason why it should be taken away.

MR. VAN FLEET: With all due respect to the State Court, I disagree with you. I think we would get a better up-set price if we sold it here. They wouldn't take any old thing in this Court. That is my experience in San Francisco.

MR. BEARDSLEY: Of course, nobody is interested in the property until the bondholders are paid in full. There are some $900,000 against this property. Neither the stockholders nor any other creditor could be interested in any way until there was $900,000 net realized from the property. Now, there isn't any possibility of securing such a price at any cost and it is simply a question of diminishing the costs and expenses. We have two expensive proceedings here, because we are dealing with a new procedure we are compelled to make law as we go along. We have to account to this Court for the trusteeship and we have got to account to the State Court for the receivership and it is our idea that if the matter is dismissed here, it should go back to the State Court and we should be allowed to carry the matter along with minimum expense. In other words, this is not the usual proceeding in Bankruptcy, because there is not one dollar of assets shown here, we submit, to pay to bondholders, there-

fore, nothing to allocate among the various creditors.

MR. MOUNT: I brought you over this morning. What I stated is [400] substantially correct, isn't it? Will you take the stand?

A. J. MOUNT

Called for the Debtor and sworn.

MR. VAN FLEET: Q. You remember receiving this letter, of which this is a copy, don't you? A. No.

Q. Well, did you ever see this letter Mr. Kinney wrote before it was sent, or did you have any conversation about it before it was written? A. No.

MR. BEARDSLEY: Referring to the letter of May 27, 1935?

MR. VAN FLEET: Yes.

Q. You never saw that letter? THE WITNESS: No.

Q. Well, have you any idea—I will put it this way: Would you, yourself, be willing to recommend to the bondholders that they should take sixty cents on the dollar for their claims, $400,000 for their claims?

MR. BEARDSLEY: I object to the question as immaterial. It is not proper to call the president of this institution with relation to matters that not only affect the interests of the bank—

THE MASTER: The objection wi*oo* have to be sustained, because Mr. Mount's saying what he

might or might not be willing to recommend, does not meet any issue, it seems, before me now.

MR. VAN FLEET: The answer can go into the record.

THE MASTER: Well, it is not necessary, but I suppose there can be no objection to Mr. Mount's saying whether he would or would not recommend that if he wishes to. I will not force him to answer, however.

MR. BEARDSLEY: I assume it would be necessary for him to have advice and counsel on that question.

THE MASTER: It is so clearly incompetent. He cannot bind anybody and you have no offer to make to substantiate your position. That is, if you had before me here a certainty or even a reasonable prospect, I would see, that you could put down on the desk [401] the amount of money you suggest, Mr. Mount might be willing to recommend it. Then the question might have some bearing, but it cannot have bearing in this nebulous proposition.

MR. VAN FLEET: I submit it is not nebulous. However, I will put it in this way:

Q If you know, if the bondholders would take $400,000 for their bonds, that Mr. Jurgens could obtain a loan from the Reconstruction Finance Corporation, which, besides the $400,000 to the bondholders, would pay the taxes on the property, pay a certain amount for rehabilitation and pay the expenses of this proceeding, would you recommend it to your people?

MR. BEARDSLEY: The same objection.

THE MASTER: Sustained.

MR. VAN FLEET: I would like to have the answer in the record.

THE MASTER: I am not going to force Mr. Mount to make the answer.

MR. VAN FLEET: Have you got discretion, as the Referee?

THE MASTER: I am going to take it. I cannot see by any possibility, that anything Mr. Mount could say would bind anybody. It is so plainly incompetent, I don't see why this business man should be compelled to make a statement that might embarrass him with his company or the banks or anybody else. I am not going to do it.

MR. VAN FLEET: I see. I take an exception.

THE MASTER: Take an exception to both rulings. You think you are right. I am certain I am right. You might as well have the benefit of it.

MR. VAN FLEET: All I ask is that you write your recommendation out.

THE MASTER: I have not made up my mind what my recommendation is going to be yet.

MR. VAN FLEET: I don't want to take any more time.

THE MASTER: If it is submitted, I will decide by Friday.

MR. VAN FLEET: Submitted as far as I am concerned.

MR. BEARDSLEY: As far as we are concerned. [402]

MR. VAN FLEET: As far as the claims are concerned, they have not been passed upon.

THE MASTER: Generally speaking, the ones not excepted to are considered allowed.

MR. VAN FLEET: Excepting that one for $120,000.

THE MASTER: It may not be necessary to pass on that. If you think it necessarp to do so, I will give Mr. Silverstein a chance to present the matter here and all you gentlemen a chance to participate, but I don't think it is material as long as it is evident you have not got a consent to your plan by the necessary number of the one class of creditors at least.

MR. BEARDSLEY: Isn't this the situation, that this matter was continued some two months ago, because the point was raised that the matter could not be dismissed or the plan passed upon until they had had an opportunity to see whether or not they could get a two-thirds consent from all classes of bondholders. Now, they have had the opportunity and have not the consent of one percent of any class of creditors. Therefore, it is not necessary to count the claims to see whether they have an adequate percentage.

MR. VAN FLEET: I agree with you on that, but if it is in liquidation, the claims would be very necessary.

MR. BEARDSLEY: If it comes to a liquidation, the claims would have to be presented, under the statute, all over again.

MR. VAN FLEET: I don't see why that should be.

THE MASTER: Gentlemen; I am going to submit this matter. I don't know whether I will wait until Friday to pass on it or not.

MR. VAN FLEET: Anyway, will you write your recommendation out?

THE MASTER: They are always written.

[403]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 410 pages, numbered from 1 to 410, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The Oakland Hotel Company, Debtor No. 25428, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seventy-three & 85/100 ($73.85) and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this ..... day of January A. D. 1936.

Walter B. Maling, Clerk.

By C. W. Callnath,

Deputy Clerk. [411]

[Endorsed]: No. 7986. United States Circuit Court of Appeals for the Ninth Circuit Oakland Hotel Company, a Corporation, Appellant, vs. Crocker First National Bank of San Francisco, Central Bank of Oakland, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt, William B. Faville, Ralph W. Kinney, Edmond A. Soule & James A. Wainright, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 31, 1936.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

In Bankruptcy No. 7986

In the Matter of the Application of OAKLAND HOTEL COMPANY under Section 77B of an Act of Congress of the United States of July 1, 1898, entitled: "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES, As AMENDED JUNE 7, 1934".

PETITION FOR APPEAL (ORIGINAL)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT

OF APPEALS FOR THE NINTH CIRCUIT.

Your OAKLAND HOTEL COMPANY conceiving themselves aggrieved by the decree of the United States district Court for the Northern District of California, Southern Division, overruling exceptions to the Master's report of June 6th, 1935, confirming the report dismissing the above proceelings, allowing compensation and reimbursement of expenses for the attorneys for the bondholders, denying compensation and reimbursement of expenses for attorneys for the debtor, OAKLAND HOTEL COMPANY, petitioner here, which decree was entered and filed on the 18th day of July, 1935, but which did not become final until August 21st, 1935, by reason of petition for rehearing which was denied on that date, files this its petition for leave to appeal to this honorable court from said decree of the District Court.

Your petitioner refers to the Assignment of Errors filed by it simultaneously setting forth the errors made by the court below and giving the grounds for this appeal and make said assignment of errors a part hereof.

This is a proceeding under 77B of the Bankruptcy Act, in which all attempts at reorganization were opposed by the bondholders over a period of ten months finally culminating in a dismissal of the proceedings as appears by the decree referred to above and sought to be appealed from.

On the 18th day of October, 1934, Oakland Hotel

Company, a California corporation, the debtor, filed its petition pursuant to Section 77B of the Bankruptcy Act for its reorganization under the provisions of that act, setting forth its insolvent condition, the possibility of a reorganizaton, the bond issue on the hotel property in 1910, the purchase of the hotel property by the Chas. C. Jurgens Co., in 1917, involving an investment of that company of One Million Two Hundred Thousand Dollars ($1,200,000.00), including advancements by that company of over Three hundred thousand dollars ($300,000.) setting forth facts which showed a substantial equity and that hotel property had returned a substantial income for many years and the reason why a reorganization would be of any avail.

On October 20th, 1935, an order was entered and filed by the District Court approving said petition as filed in good faith and complying with Section 77B of the Bankruptcy Act.

On October 23rd, 1935, a further order was filed approvng the petition as above and appointing Henry Barker as temporary Trustee and containing the usual restraining orders.

Thereafter objections were filed to this latter order appointing Henry Barker Trustee by the debtor upon the ground that he was the trustee appointed by the Superior Court of Alameda County in foreclosure proceedings by the bondholders and that he represented the bondholders alone and would not be an impartial trustee being opposed to these reorganization proceedings.

On October 23rd, 1935, the District Court appointed Mr. Charles Beardsley attorney for the trustee. At the same time Mr. Beardsley's firm, Fitzgerald, Abbott & Beardsley, represented the bondholders and have appeared throughout this proceeding for said bondholders opposing the various steps in this proceeding.

Thereafter in due course notice was given to such creditors and stockholders as were known of a day of hearing for the appointment of a permanent trustee.

In the meantime the bondholders, appellees, here, through their attorneys Chickering & Gregory and Mr. Beardsley's firm, filed a so-called answer to the debtor's petition which had already been approved, setting forth that there was no equity in the hotel company, denying the facts alleged in the petition and asking for the dismissal of the proceeding.

They also filed an opposition to the debtor being placed in possession of the property.

A motion was filed by the debtor to dismiss this answer as it was not sufficient under Section 77B in law and did not come within the purview of that section there having been an order already allowing the petition of the debtor.

After these answers and motions had been filed, the matter came on regularly for the appointment of a permanent trustee.

Thereupon, on the 19th day of November, 1934, the District Court referred these issues, including

the requested dismissal and the appointment of Henry Barker to the Bankruptcy Referee, W. A. Beasley, as Special Master, to take testimony ascertain the facts and report said facts with his conclusions.

Thereafter a hearing was had before the Special Master on November 30th, December 17th and 18th, 1934, in which a record was made of nearly two hundred pages and evidence was put in by the debtor and the bondholders as to the value of the equity and the possibility of a reorganization. This hearing consisted of a discussion of law and facts.

Thereupon the special Master filed his report dated the nineteenth day of December, 1934, holding that the petition of the debtor, Oakland Hotel Company, is filed in good faith and that "there is need for reorganization of the corporation as will appear from the transcript submitted herewith" and giving the debtor until February 15th, 1935 to file a plan of reorganization. The Special Master also recommended the retaining of Henry Barker as trustee until the reorganization had been completed.

This report of the Special Master was confirmed by the District Court on the tenth day of January, 1935.

Thereafter on February 14th, 1935, a plan of reorganization was filed by the debtor and a time and place was fixed for hearing the same on the 26th day of March, 1935, before the District Court and notice given.

In the meantime the bondholders through the afore-

said attorneys filed an opposition to the plan of reorganization that the plan was not fair or equitable and was not feasible but not stating any facts and praying that the action be dismissed.

Thereupon when the hearing came up before the District Court attorneys for the debtor objected that before a hearing could be had on the plan that the creditors and stockholders must be brought into court as provided by the Bankruptcy Act, sub. 6 of sub-section C of Section 77B, their claims and interests filed and evidenced and then passed upon and either allowed or disallowed and notice given to this effect.

The District Court thereupon on the 3rd day of April, 1935, referred the question of this prerequisite to the Special Master by an order requiring him to determine the matter, if he determined it was necessary to comply with these provisions to give the proper notices, hold hearings upon the claims filed, and then hold a hearing on the plan submitted.

Thereupon a hearing was had by the referee upon the question of complying with these provisions of the statute, attorneys for the bondholders filed a long opposition to this proceeding, to the authentication of claims and interests of stockholders as being futile and only interposed for delay.

The Special Master determined on April 17th, 1935, that these provisions must be complied with, as they were jurisdictional.

The master than made an order which was ap-

proved by the District Court giving the creditors and stockholders until May 31st to file their claims and interests setting forth how they should be evidenced and fixing June 3rd, 1935, for the hearing of said claims and interests and continuing the hearing on the proposed plan until that date.

The Master sent out the proper notices, claims were filed and the matter came up for hearing on that date.

At that hearing the debtor told of a conference he had held with the local committee of the Reconstruction Finance Corporation at which were present the attorneys for the bondholders; at that conference the local committee made an effort to obtain some idea of how much the bondholders would take in cash or cash and stock for their claims so that a loan could be recommended to Washington upon the hotel property but the attorneys refused to commit themselves or to take any part in the proceedings.

The session of June 3rd, 1935, was taken up with these recommendations of the Reconstruction Finance Committee.

No hearing was had as to the feasibility or equitableness of the plan proposed.

The Special Master then filed a report on June 6th, 1935, recommending the dismissal of these proceedings.

It is this report that petitioner is objecting to as containing no findings of fact or conclusions of law or anything upon which conclusions or findings

can be predicated.

The difficulty arose on the procedure heretofore followed in these matters, the report not being drawn in accordance with Local Rule 46 which is the equity rule, but being filed under Rule 7, Bankruptcy, which gave no time for exceptions or correction of the report.

Your petitioner obtained an order giving him twenty days for exceptions but the first time he had opportunity to object to the procedure was in these exceptions, which he has done.

The first time he had apportunity to ask for special findings was in these exceptions. This is an equity proceeding to which Rule 46 of the District Court and Rules 70½ and 66 of Equity apply.

The petitioner duly filed his exceptions to the report of the Special Master to which attorneys for bondholders filed a reply claiming this was not an equity proceeding and these did not apply. They also filed briefs to that effect.

Attorneys for petitioner filed a petition for rehearing particularizing these Equity rules which the District Court considered at two hearings, but finally denied.

Summing up this appeal, it is based upon the assignments of error filed herewith, showing there was never any adequate hearing of any plan after the creditors and stockholders were properly brought into court, although the court found there was need for reorganization, that there was no proper report recommending dismissal, no findings

of fact or conclusions of law as continually requested and there should have been a recommittal for a proper hearing of the plan, of evidence of the value of the equity of the Hotel Company and wherein the plan was deficient,—that the petitioner has not had his full day in court, nor his rights under the equity rules or the provisions of Section 77B that the bondholders have been concerned with dismissing the proceedings, have opposed every step, and no hearing was had under sub. (d) of paragraph (5) of subsection (b) of Section 77B to determine the equitableness or fairness of any plan.

As to the attorneys' fees and costs and expenses, Section 77B provides for an appeal which may be disposed of summarily.

Attorneys for debtor filed a petition setting out the immense amount of work done in the last twelve months in attempting to reorganize the company, most of the time spent in fighting attempts to dismiss the proceedings in which the bondholders finally succeeded in the lower court. The plea for attorneys' fees was opposed by attorneys for the bondholders upon the grounds which are criticisms of the act itself, claiming the debtor and his attorneys to be obstructionists, although seeking the relief which Congress has offered the corporation debtor. On the other hand the efforts of the attorneys for the bondholders have been wholly devoted to opposing the relief granted by the Act and not to any constructive service. If this is good service to the bondholders, they should

pay for the service but it does not come under the provisions of Sub (9) of subsection (c) of Section 77B.

WHEREFORE, your petitioner prays that he be allowed in the discretion of this Honorable Court to appeal in matters of law herein and that the prayer of this petition be granted and that a citation issue to the bondholders named as appellees and that the amount of the bond be fixed.

Dated this 19th day of September, 1935.

OAKAND HOTEL COMPANY,
By W. C. Jurgens, President
Petitioner.

ROBBINS & VAN FLEET
Attorneys for Petitioner.

ASSIGNMENTS OF ERROR ON PETITION FOR APPEAL

Now comes OAKLAND HOTEL COMPANY, and in support of its appeal from the decree of the above-entitled court on the 18th day of July, 1935, which became final on the 21st day of August, 1935, and which overruled exceptions to the master's report dismissed the entire proceedings allowed compensation and expenses to attorneys for bondholders and denied any compensation or expenses to attorneys for debtor, Oakland Hotel Company, and assigns as errors which render said decree in-

correct and unjust, and which have been duly excepted to on the various hearings, the following:

1. The court erred in overruling each and all of the exceptions to the master's report of June 6, 1935, upon the grounds stated in said exceptions which are hereby referred to and made a part hereof.

2. The court erred in confirming the said master's report of June 6, 1935, upon the grounds set out in said exceptions.

3. The court erred in confirming the Master's report after it was pointed out to him in argument and in the petition for rehearing that the master did not apply to his report the equity rules applicable thereto and did not comply with local rule 46 and did not make any findings of fact or conclusions of law as he was required to do in an equity case.

4. The above court erred in not making findings of fact and conclusions in his decree or in not recommitting the master's report for that purpose as required on argument and in the petition for rehearing contrary to Equity Rule 70 1/2.

5. That in argument on the report of the Master of June 6, 1935, and in the petition for rehearing appellant requests special findings of fact as to the value of the hotel property and the equitableness of the reorganization plan submitted which was ignored by the above—entitled court.

6. That the court erred in denying the petition for rehearing upon all the grounds stated herein

which are hereby referred to and made a part hereof.

7. That the court erred in dismissing the above proceedings for the reason that no hearing was had on the proposed plan after the proper notices were sent to creditors and stockholders and the claims and interests were allowed and the creditors and stockholders were properly in court.

8. That the Master's report of June 6, 1935, is not a report of any kind in an equity case but simply a recommendation of dismissal which does not support the decree.

9. That the court erred in not applying Local Rule 46 and Equity Rule 70 1/2 to these proceedings.

10. That the Master after recommending a reorganization of the Oakland Hotel Company in the report of December 19th, 1934, held no further hearings to determine the value of the hotel property or the adequacy of the plan proposed but dismissed the proceedings.

11. That the Master and the Court erred in ignoring the proceedings before the Reconstruction Finance Corporation.

12. That the Court erred in denying any attorneys' fees or reimbursement of expenses to the attorneys for the Oakland Hotel Company, Appellant, contrary to paragraph 9 of subsection C of Section 77B of the Bankruptcy Act, although the attorneys spent a year attempting to carry out the purpose of Congress in this reorganization and

expended five hundred ($500.00) dollars in so doing.

13. That the court in allowing attorneys for the creditors generous fees and expenses, although their time was spent in opposing every step taken under the act and opposing any reorganization and during this time some of the attorneys were acting for the trustee who was supposed to represent the debtor as well as the creditors.

14. That the Court erred in its order of August 23rd, 1935, discharging the trustee and transferring the property to the state court for the reason that the ten days stay, (28 U.S.C.A. 874) was in force and effect.

15. That the court erred in overruling the objection that no opportunity was given appellant herein in accordance with local Rule 46 to present any objections to a draft report of the Findings of the Master or ask for Special findings.

16. That no hearing was held upon the plan of reorganization as required by the orders of April 3, 1935, and April 17th, 1935, requiring the Master to take testimony to ascertain the facts and report such facts with his conclusions to the Court.

Dated this ——— day of September, 1935.

OAKLAND HOTEL COMPANY,
By W. C. Jurgens Petitioner.

ROBBINS & VAN FLEET
Attorneys for Petitioner.

[Endorsed] Filed Sep 19 1935
Paul P. O'Brien, Clerk.

UNITED STATES OF AMERICA, SS:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To Crocker First National Bank of San Francisco, Central Bank of Oakland, Kate M. Palmanteer, Thomas A. Crellin, James K. Moffitt, William B. Faville, Ralph W. Kinney, Edmond A. Soule and James A. Wainright, Bondholders and their representatives, GREETING:

YOU ARE HEREBY CITED AND AMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division wherein OAKLAND HOTEL COMPANY is appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected. and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CURTIS D. WILBUR, United States Circuit Judge for the Ninth Judicial Circuit this 21st day of October, A. D. 1935.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

Receipt is hereby acknowledged of a copy of the within Citation and Order accompanying the same, this 22nd day of October, 1935.

CHICKERING & GREGORY
FITZGERALD, ABBOTT &
BEARDSLEY,
Attorneys for bondholders, appellees.

[Endorsed] Citation on Appeal. Filed Nov. 25, 1935.

PAUL P. O'BRIEN, Clerk.

United States Circuit Court of Appeals
Ninth Circuit.

OAKLAND HOTEL COMPANY,
(a coporation)

Appellant,

vs.

CROCKER FIRST NATIONAL BANK,
et als.,

Appellees.

To Attorneys for Creditors:

We hereby designate the following portions of the record to be printed by the clerk:

1. All that portion of the record down to page 212, containing the papers filed and proceedings in the cause;

2. All that portion of the transcript beginning

with Line one (1) at page 213 and ending with line seven (7) of page 222;

3. Beginning with line twelve (12), page 223, and ending with line twenty (20), page 226;

4. Include lines 3 and 4 of page 245. Then begin with line 13, page 245 and ending with page 253, line 13.

4. Beginning with line nine (9) of page 256 and ending with line 23, page 256. Then beginning with line nine (9), page 257 and ending with end of page 257. Beginning with line 15, page 258 and ending with line 29, page 258. Beginning with line 19, page 259 and ending with line 14, page 260.

6. JAMES A. WAINRIGHT recalled afternoon session.

Beginning with line one (1), page 265 and ending with line 6, page 267.

Beginning with line five (5) page 268 and ending with line 18, page 271;

7. Beginning with line 23, page 271 and ending with line eight (8), page 273. Beginning with line 17, page 273 and ending with line two (2), page 275. Beginning with line 29, page 275 and ending with line 25, page 279.

Beginning with line two (2), page 280 and ending with line 24, page 290.

8. TUESDAY, December 18, 1934, 10 A. M.

Beginning with line 25, page 293 and ending with line 3, page 301;

Beginning with line one (1), page 306 (omitting lines 9-10-11) and ending with line 7, page 336.

9. Afternoon session. E. LOUVAU.

Beginning with line two (2), page 337, ending with line 30, page 369.

10. Beginning with line 18, page 383, and ending with end of transcript, page 403.

Dated: March 25, 1936.

ROBBINS & VAN FLEET
Attorneys for Appellant.

Receipt of a copy of the above acknowledged, March 25th, 1936.

CHICKERING & GREGORY
FITZGERALD, ABBOTT & BEARDSLEY.

[Endorsed] Filed Mar 27 1936
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
Ninth Circuit.

OAKLAND HOTEL COMPANY,
(a corporation)

Appellant,

vs.

CROCKER FIRST NATIONAL BANK,
et als.,

Appellees.

APPELLEES' DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

To the Attorneys for Oakland Hotel Company, a corporation, the above named appellant:

In addition to the portions of the record desig-

nated by attorneys for appellant to be printed by the clerk of the above entitled court, we hereby designate the following portions of the record to be printed by said clerk:

1. All that portion of the transcript beginning with line 1 on page 375 and ending with line 9 on page 376;

2. All that portion of the transcript beginning with line 14 on page 376 and ending with line 17 on page 377;

3. All that portion of the transcript beginning with line 4 on page 383 and ending with line8 on page 383;

4. The following designated Exhibits:

(a) Creditors' Exhibit 1
(b) Creditors' Exhibit 2
(c) Creditors' Exhibit 3
(d) Creditors' Exhibit 4
(e) Creditors' Exhibit 5
(f) Creditors' Exhibit 6
(g) Creditors' Exhibit 7

DATED: March 30, 1936.

FITZGERALD, ABBOTT & BEARDSLEY
CHICKERING & GREGORY
Attorneys for Appellees.

Receipt of a copy of the within is hereby admitted this—day of March, 1936.

Robbins & Van Fleet,
Attorneys for Appellant

[Endorsed] Filed Mar 30 1936
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
Ninth Circuit.

OAKLAND HOTEL COMPANY,
(a corporation)

Appellant,

vs.

CROCKER FIRST NATIONAL BANK,
et als.,

Appellees.

STIPULATION FOR USE OF ORIGINAL EXHIBITS

IT IS HEREBY STIPULATED by and between the Appellant and Appellees in the above entitled cause that all the exhibits of the Appellant and Appellees which have been brought up on this appeal in their original form may be omitted from the printed record and used in their original form in the further prosecution and hearing of this appeal.

Dated: March 31, 1936.

ROBBINS & VAN FLEET
Attorneys for Appellant.
FITZGERALD, ABBOTT & BEARDSLEY.
CHICKERING & GREGORY
Attorneys for Appellees.

IT IS SO ORDERED.

CURTIS D. WILBUR, Circuit Judge.

[Endorsed] Filed Mar 31 1936

Paul P. O'Brien, Clerk.

No. 7986

United States
Circuit Court of Appeals

For the Ninth Circuit.

OAKLAND HOTEL COMPANY, a Corporation,
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE & JAMES A. WAINRIGHT,
Appellees.

APPELLANT'S BRIEF

CAREY VAN FLEET,
LLOYD M. ROBBINS,
ROBBINS & VAN FLEET,
Crocker Building,
San Francisco, California,
Attorneys for Appellant.

PACIFIC BRIEF PRINTING CO., BERKELEY—SAN FRANCISCO

SUBJECT INDEX

	Page
Statement of Facts	1
The Purpose of 77B of the Bankruptcy Law	21
There Was No Hearing or Determination of a Proposed or Any Plan of Reorganization	26
Report of Special Master of June 6, 1935, Recommending Dismissal	27
There Are No Findings in the Report of the Special Master of June 6, 1935, But Only a Summary Dismissal of This Case	33
Application of Equity Rule 70½	34
Petition for Payment of Attorney's Fees and Costs Expended by Debtor in Carrying Out the Purpose of 77B	38

TABLE OF AUTHORITIES CITED

Bankruptcy Act, sec. 77B 2, 3, 5, 6, 7, 10, 14, 20, 21, 22, 26, 30, 36, 38
Bankruptcy Rule 7 ..... 12, 31, 32
Bankruptcy Rule 37 32
Borden's Co. v. Baldwin, 293 U. S. 213 35
Bullard v. Cisco, 290 U. S. 179-180 36
Central States Life Insur. Co. v. Koplar, 80 Fed. (2d) 754, at p. 759, 760 22
Continental Ill. Nat'l Bank v. Chicago, Rock Is. S. P. R. Co., 294 U. S. 648 33

TABLE OF AUTHORITIES CITED—Continued

Page

Equity Rule 46 ..... 12, 31, 32
Equity Rule 61½ 32
Equity Rule 66 12
Equity Rule 70½ 12, 34
E. T. Kenney Co., 136 Fed. 451 36

In re Central Funding Corp., 75 Fed. (2d) 256 22
In re Flamingo Hotel Co., 81 Fed. (2d) 749 39
In re Hertz, Inc., 81 Fed. (2d) 571 39
In re Kelly Springfield Tire Co., 13 Fed. Supp. 724 39
In re Kentucky Elec. Power Corp., 11 Fed. Supp. 528 39
In re National Lock Co., 82 Fed. (2d) 600 40
In re New Rochelle Coal & Lumber Co., 75 Fed. (2d) 881 22
In re Pierce, 210 Fed. Rep. 389 31
In re Prudence Bonds Corp., 75 Fed. Rep. (2d) 262 22
In re Selton Nat'l Fiber Can Co., 13 Fed. Supp 83 39
In re Wayne Pump Company, 9 Fed. Supp 940 ..... 39, 40

Los Angeles Gas Co. v. Railroad Commission, 289 U. S., pp. 327-331 35

Meadows v. Cheshire, 58 Fed. (2d) 628 34

San Francisco Building Corp. v. Leigh M. Battson, as Trustee 4, 22
Siano v. Helvering, 79 Fed. (2d) 444 35
Supreme Court Bankruptcy Rule 12 32
Supreme Court, Bankruptcy Rule 27 32

Toledo P. W. R. R. Co. v. Peoria, etc., R. R. Co., 72 Fed. (2d) 745, at p. 747 ..... 30, 34

U. S. C. A., Bankruptcy, Title 11, sec. 206 ..... 21, 36
U. S. C. A., Bankruptcy, Title 11, sec. 207 39

Weil v. Neary, 278 U. S. 160, at p. 168 16

No. 7986

United States
Circuit Court of Appeals

For the Ninth Circuit.

OAKLAND HOTEL COMPANY, a Corporation,
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE & JAMES A. WAINRIGHT,
Appellees.

APPELLANT'S BRIEF

STATEMENT OF FACTS

The record in this case reveals that there was never any sincere attempt to reorganize the Oakland Hotel Company for the benefit either of the debtor, Oakland Hotel Company, or for the benefit of the bondholders and creditors. If the proceedings herein had followed the orderly procedure outlined by the act and there had been full considera-

tion given to a plan or plans of reorganization, after which the lower court found that it could not approve any such plan or plans, we would not be burdening this already overworked court with an appeal in this case, but from the very beginning herein, the trustee and his attorney and the attorneys for the bondholders committee were determined that this proceeding should be dismissed. They were opposed to the remedial purposes of the act, section 77B of the Bankruptcy Act, and the debtor, petitioner herein, and his attorneys, have had to consume their time in fighting this continual pressure upon the courts to have this proceeding dismissed rather than in furthering and accomplishing the plan of reorganization, although it was determined in the course of the proceeding that this property should be reorganized. (See the first Report of the Special Master of December 19, 1934 (Trans., p. 89).) Most of the record, as the court will observe, was taken up with this fight to dismiss the proceeding. The trustee and his attorney and the bondholders committee even opposed the giving of notices to the stockholders and creditors which was a jurisdictional prerequisite to the filing of claims by the stockholders and creditors. They even opposed the filing of claims by the stockholders and creditors as a necessary prerequisite (Trans., p. 168). We were continually fighting over these matters of procedure. The Master in Chancery from the beginning seemed disposed to dismiss this proceeding but after an exhaustive fight he finally deter-

mined that the petition of the debtor was filed in good faith and "that there is need for reorganization of the corporation", as will appear from the transcript of testimony submitted to him. There never was any full consideration of any plan of reorganization. The proceedings of Monday, June 3, 1935 (Trans., p. 409), show that there was no chance of any consideration of a plan of reorganization proposed or any other plan of reorganization. We ask the Court to read carefully the proceedings of that date. They will see that there was no hearing of any plan of reorganization. We are not concerned with technicalities in this appeal except as they show that the purposes and spirit of Section 77B of the Bankruptcy Act are ignored and the debtor, petitioner, was not given the benefit of the consideration of any plan. We are also constrained to add that the petitioner herein, Oakland Hotel Company, a family corporation, gave evidence throughout its career of being concerned with the welfare of its creditors as well as of itself. The Chas. Jurgens Co. took over this property in 1917. At that time there was this bond issue on the property of $750,000.00 which had been placed on the property in 1910. They invested in the property over a Million, Two Hundred Thousand ($1,200,000.) Dollars. They mortgaged their other property in order to pay the debts of the debtor. In fact, they sacrificed a magnificent holding in Oakland of four or five million dollars in order to carry on this hotel (Trans., pp. 369, 370, 371). In fact, for seven

years they made this hotel pay an income save and except paper depreciation, called Building Depreciation, (See the exhibit prepared by Mr. Louvou, Debtor's Ex. No. 12 (Trans., p. 363).), being a summary of the income, expenses, operating profit, taxes, depreciation of the company from the year 1913 to the year 1933. The testimony of the opposing creditors was restricted to the period from 1929 to 1934, which is no criterion of anything in this case, as these were the years of the depression. Still, the Creditors' Opposition to the Debtor's Request for Order Placing Debtor in Possession (Trans., p. 64-73) shows that they claimed that during the Barker management the hotel was holding its own. It is these aspects which distinguish this case from such cases as the *San Francisco Building Corporation, Ltd.*, v. *Leigh M. Battson, as trustee,* decided by this Court on March 17, 1936. In otherwords, we are confronted with a case here which the opposing creditors have tried to treat summarily and our time has been consumed in fighting a continual putsch to dismiss and no bona fide sincere attempt has been made to assist in any reorganization plan or to try to work out any such plan for the benefit not only of the debtor but of the bondholders themselves, and it will end, if end it must, in a forced sale of this property in which the bondholders will be the losers, although it is a magnificent property, a civic betterment to the City of Oakland and if properly handled it may at least increase in value inuring to the benefit of the bondholders and saving an equity

for the company. There was no approval or disapproval of a plan after hearing, as in the Battson case.

This is the real purpose of the remedial legislation known as Section 77B of the Bankruptcy Act, but we say frankly to this Court that in this prolonged fight we have been faced with an opposition to the Act of Congress itself, a lack of sympathy with the processes of the act, an assumption that the property now belongs to the bondholders or, may we say, the bondholders committee, and that in taking advantage of the act, the Oakland Hotel Company interposed an illegitimate obstacle to the acquirement of the property by real estate speculators. For these reasons we present this appeal, not for any purposes of delay. As practising lawyers at this Bar we have no desire to consume the time of this Court with a frivolous appeal. We only desire to have this Court examine the record and see for themselves if there is any succour which can be extended to this corporation and to determine in their high equity powers whether they will send the cause back to the lower court for a full consideration of any plans which have been or may be submitted. We realize that the bondholders have not accepted the plan submitted but it has never been properly presented to them. The bondholders committee have kept the matter in their own hands. Section 77B, subdivision (b), clause 5, sub clause (d) has never been tried out. It has never been found that this

plan or any other plan did not equitably and fairly provide protection for the creditors.

It is for these reasons that the equity rules for the federal courts and the requirements of the federal courts with reference to findings of fact and conclusions of law in an equity case become pertinent because they secure for us a full hearing in this cause, which has been denied us. The procedural aspects of this case are as follows:

This is a proceeding under 77B of the Bankruptcy Act, in which all attempts at reorganization were opposed by the bondholders over a period of ten months finally culminating in a dismissal of the proceedings as appears by the decree referred to above and sought to be appealed from (Trans., p. 221).

On the 18th day of October, 1934, Oakland Hotel Company, a California corporation, the debtor, filed its petition pursuant to Section 77B of the Bankruptcy Act for its reorganization under the provisions of that act, setting forth its insolvent condition, the possibility of a reorganization, the bond issue on the hotel property in 1910, the purchase of the hotel property by the Chas. C. Jurgens Co., in 1917, involving an investment of that company of One Million Two Hundred Thousand Dollars ($1,200,000.) including advancements by that company of over Three Hundred Thousand Dollars ($300,000.) setting forth facts which showed a substantial equity and that hotel property had returned

a substantial income for many years and the reason why a reorganization would be of any avail (Trans., p. 2).

On October 20th, 1935, an order was entered and filed by the District Court approving said petition as filed in good faith and complying with Section 77B of the Bankruptcy Act (Trans., p. 32).

On October 23rd, 1935, a further order was filed approving the petition as above and appointing Henry Barker as temporary trustee and containing the usual restraining orders (Trans., p. 33).

Thereafter objections were filed to this latter order appointing Henry Barker trustee by the debtor upon the ground that he was the trustee appointed by the Superior Court of Alameda County in foreclosure proceedings by the bondholders and that he represented the bondholders alone and would not be an impartial trustee being opposed to these reorganization proceedings (Trans., p. 38).

On October 23, 1935, the District Court appointed Mr. Charles Beardsley attorney for the trustee. At the same time Mr. Beardsley's firm, Fitzgerald, Abbott & Beardsley, represented the bondholders and have appeared throughout this proceeding for said bondholders opposing the various steps in this proceeding (Trans., p. 37).

Thereafter in due course notice was given to such creditors and stockholders as were known of a day of hearing for the appointment of a permanent trustee.

In the meantime the bondholders, appellees, here, through their attorneys Chickering & Gregory and Mr. Beardsley's firm, filed a so-called answer to the debtor's petition which had already been approved, setting forth that there was no equity in the hotel company, denying the facts alleged in the petition and asking for the dismissal of the proceeding (Trans., p. 73).

They also filed an opposition to the debtor being placed in possession of the property (Trans., p. 64).

A motion was filed by the debtor to dismiss this answer as it was not sufficient under Section 77B in law and did not come within the purview of that section there having been an order already allowing the petition of the debtor (Trans., p. 86).

After these answers and motions had been filed, the matter came on regularly for the appointment of a permanent trustee.

Thereupon, on the 18th day of November, 1934, the District Court referred these issues, including the requested dismissal and the appointment of Henry Barker to the Bankruptcy Referee, W. A. Beasley, as Special Master, to take testimony, ascertain the facts and report said facts with his conclusions (Trans., p. 83). Thereafter a hearing was had before the Special Master on November 30th, December 17th and 18th, 1934, in which a record was made of nearly two hundred pages and evidence was put in by the debtor and the bondholders as to

the value of the equity and the possibility of a reorganization. This hearing consisted of a discussion of law and facts (Trans., p. 250).

Thereupon the Special Master filed his report dated the nineteenth day of December, 1934, holding that the petition of the debtor, Oakland Hotel Company, is filed in good faith and that "there is need for reorganization of the corporation as will appear from the transcript submitted herewith" and giving the debtor until February 15th, 1935, to file a plan of reorganization. The Special Master also recommended the retaining of Henry Barker as trustee until the reorganization had been completed (Trans., p. 89).

This report of the Special Master was confirmed by the District Court on the tenth day of January, 1935 (Trans., p. 103).

Thereafter on February 14th, 1935, a plan of reorganization (Trans., p. 110) was filed by the debtor and a time and place was fixed for hearing the same on the 26th day of March, 1935, before the District Court and notice given (Trans., p. 119).

In the meantime the bondholders through the aforesaid attorneys filed an opposition to the plan of reorganization that the plan was not fair or equitable and was not feasible but not stating any facts and praying that the action be dismissed (Trans., p. 128).

Thereupon when the hearing came up before the

District Court, attorneys for the debtor objected that before a hearing could be had on the plan that the creditors and stockholders must be brought into court as provided by the Bankruptcy Act, sub. 6 of sub-section C of section 77B, their claims and interests filed and evidenced and then passed upon and either allowed or disallowed and notice given to this effect (Trans., p. 168).

The District Court thereupon on the 3rd day of April, 1935, referred the question of this prerequisite to the Special Master by an order requiring him to determine the matter, if he determined it was necessary to comply with these provisions to give the proper notices, hold hearings upon the claims filed, and then hold a hearing on the plan submitted (Trans., p. 134).

Thereupon a hearing was had by the referee upon the question of complying with these provisions of the statute, attorneys for the bondholders filed a long opposition to this proceeding, to the authentication of claims and interests of stockholders as being futile and only interposed for delay.

The Special Master determined on April 17th, 1935, that these provisions must be complied with, as they were jurisdictional (Trans., p. 131).

The Master then made an order which was approved by the District Court giving the creditors and stockholders until May 31st to file their claims and interests setting forth how they should be evi-

denced and fixing June 3rd, 1935, for the hearing of said claims and interests and continuing the hearing on the proposed plan until that date (Trans., p. 134).

The Master sent out the proper notices, claims were filed and the matter came up for hearing on that date.

At that hearing the debtor told of a conference he had held with the local committee of the Reconstruction Finance Corporation at which were present the attorneys for the bondholders; at that conference the local committee made an effort to obtain some idea of how much the bondholders would take in cash or cash and stock for their claims so that a loan could be recommended to Washington upon the hotel property but the attorneys refused to commit themselves or to take any part in the proceedings.

The session of June 3, 1935 (Trans., p. 409), was taken up with these recommendations of the Reconstruction Finance Committee.

No hearing was had as to the feasibility or equitableness of the plan proposed.

The Special Master then filed a report on June 6th, 1935, recommending the dismissal of these proceedings (Trans. p. 170).

It is this report that petitioner is objecting to as containing no findings of fact or conclusions of law or anything upon which conclusions or findings can be predicated.

The difficulty arose on the procedure heretofore followed in these matters, the report not being drawn in accordance with Local Rule 46 which is the equity rule, but being filed under Rule 7, Bankruptcy, which gave no time for exceptions or correction of the report.

Your petitioner obtained an order giving him twenty days for exceptions (Trans., p. 74) but the first time he had opportunity to object to the procedure was in these exceptions.

The first time he had opportunity to ask for special findings was in these exceptions. This is an equity proceeding to which Rule 46 of the District Court and Rules 70½ and 66 of Equity apply.

The petitioner duly filed his exceptions to the report of the Special Master to which attorneys for bondholders filed a reply claiming this was not an equity proceeding and these did not apply (Trans., p. 180). They also filed briefs to that effect.

Attorneys for petitioner filed a petition for rehearing particularizing these Equity rules which the District Court considered at two hearings, but finally denied (Trans., p. 226).

During this period the real power over the bonds was exercised by a bondholders committee who were opposed from the very beginning to any reorganization, so that in effect the feasibility or benefit of any scheme for reorganization was never submitted to the bondholders themselves. The bondholders

committee from the very beginning was determined that there should be no reorganization. This is very evident from the record here. The trustee, Barker, was appointed temporary trustee because he had been a receiver representing the bondholders in the foreclosure proceedings in the state courts. This was enough to disqualify him but at any rate he was appointed temporary trustee over the objection of the debtor. His attorney, Mr. Beardsley, was also attorney for the bondholders. It followed, therefore, that any scheme of reorganization would receive no assistance whatsoever from this trustee although he was supposed to represent the debtor as well as the creditors. He was adverse to Mr. Jurgens and the Hotel Company throughout this proceeding. The ordinary precaution taken in the receivership was not taken in this proceeding by the lower court, that is, that there should be an impartial trustee appointed. We have no criticism of Mr. Barker in the management of the hotel; as far as we know, his management was perfectly honest but he was not a live, up-to-date hotel man. He was under dictation of the bondholders committee and of Mr. Beardsley, also, attorney for the creditors, so that the proceeding resolved itself into a fight with the trustee and with the bondholders committee on one side and the debtor on the other, the debtor trying to keep himself in court to save his equity and the trustee and the bondholders committee at every opportunity asking for a dismissal of the proceeding. Under these circumstances there could be no

consideration given to a reorganization plan. The proceedings of June 3, 1935, which were the last proceedings before the Master, reveal this. It is not intended by the amendatory act of 77B that if the plan proposed is not satisfactory there shall never be any other plan proposed. With this in mind, we took up with the Reconstruction Finance Committee of San Francisco the proposal of loaning money on the hotel in order to pay off the bondholders who up to that time had been willing through their committee to accept $400,000.00, which would be sixty cents on the dollar. In May, 1935, the Reconstruction Finance Corporation formed a mortgage company for the financing of apartments and hotels and the San Francisco committee was more than willing to consider the proposal of the Oakland Hotel Company, but under the procedure of the Reconstruction Finance Corporation, the consent of the bondholders had to be secured first and it had be ascertained what the bondholders would take for their claims. We were stymmied again there because the bondholders committee would not listen to any proposal along that line. The proceedings of June 3, 1935, with regard to this proposal, tell their own story. The proceedings of June 3, 1935, were the only proceedings in the whole record with reference to any plan of reorganization. Under paragraphs 6 and 7 of subdivision (c) of Section 77B, it was necessary that proper notices should be given to the stockholders and the bondholders for the filing of their claims and their interests and that there

should be a determination of and approval of the claims and interests before any plan of reorganization should be voted upon. This jurisdictional notice and hearing was opposed by the attorneys for the creditors and the trustee and it was only after a great deal of argument that we were able to persuade the Master that it was necessary and after these claims and interests had been brought into court the only proceedings in the matter of the reorganization are those of June 3, 1935.

On the question of the adequacy of any findings of fact and conclusions of law and the adequacy of the final report of the Master dismissing the proceeding, we had two arguments in the lower court. We went into the matter thoroughly. The lower court finally upon the assurance of the attorneys for the creditors that they considered no findings of fact and conclusions of law necessary and that they were willing to take their chances in the appellate court, denied the rehearing. The lower court made no findings of fact or conclusions of law and simply confirmed the dismissal of the proceeding by the Master. The Master's final report did not ascertain and report the facts and his conclusions as he was ordered to do by the reference but simply recommended a dismissal. It was all very arbitrary and in accordance with the policy of the attorneys for the creditors and the trustee to secure a dismissal of this proceeding from the very beginning. This is contrary to the spirit of the act and to the de-

cision of the Supreme Court of the U. S. in dealing with trustee matters.

Weil v. *Neary,* 278 U. S. 160, at p. 168.

This is purely an impersonal criticism of the attorneys in this case. There is no question about their honesty or integrity or their standing at the Bar but even leaders of the Bar must eat. One unfortunate circumstance of this case was that the trustee was not an impartial trustee by virtue of his appointment, he having all along before he was appointed, represented the creditors, and his attorney represented the creditors. We had no objection to the appointment of the attorney for the creditors in the preliminary proceeding but this was before the opposition of the creditors to the proceeding had gathered volume and they had formulated their opposition in an answer which occasioned the whole delay in this matter of any reorganization. We doubt if they were within their rights because the court had already found that the petition had been filed in good faith and it is the opinion of some of the courts that this answer of creditors should be interposed before the court finds that the petition is filed in good faith. However, we never had the benefit of the trustee who represented the debtor as well as the bondholders committee in this matter, so that the procedural steps become of importance in this matter and they are important for another reason. We are continually accused of delay here, whereas the court will see by an examination of the record that the delay was occasioned by this opposition.

The Court will also see that no plan of reorganization would ever have been acceptable to this bondholders committee. What their purpose was is not revealed by the record so we are not permitted to draw any inferences. So much for the procedural aspects of the proceeding.

All the testimony of this case went into the hearing of the creditors answer and motion to dismiss. There is a wide diversity of testimony as to the value of the hotel property and the value of the hotel property was never found by the master or the judge. The Master simply found that there was an occasion for the reorganization of this property. The testimony showed on the part of the petitioner that the property was worth the value, according to the insurance appraiser and considering the value of the real estate basing it upon the price paid for the post office site of $1,500,000.00 (See Plaintiff's Ex. 3), which is the insurance appraisal requested by the bondholders committee, and testimony in reference to the post office site which was bought by the U. S. Government. Then there was testimony as to the reproduction value of the hotel. (See the testimony of Eric H. Frisell (Trans., p. 355).) He described the hotel building, its solidity, massiveness, the framework and we filed a statement of the production costs of the building and the additions thereto for the years 1912, 1915, 1925. The original cost was $1,299,191.51, and Mr. Frisell, an engineer whom everyone recognizes as being experienced in such matters stated that to the best of his opinion a

reproduction of a building of this type at the present time would be 102%, and he states his reason (Trans., pp. 360-362). There is a wide diversity between these opinions and the opinions of Mr. Kitrelle that the whole property, building and real property, was worth only $526,000.00, but he bases his estimate upon income, which we understand has been abandoned as a basis of income by the government, or at least it is only used in connection with other forms of estimate so that by referring to the Plan of Reorganization proposed (Trans., p. 110), it will be observed that we have used the three methods. The value of the land as stated in the plan of reorganization is $550,000.00. This was the price paid for the post office site, which was of identical dimensions with the Oakland Hotel property in the year 1929. It may be higher than the price obtainable now, although they maintain the prices are rising in real estate in Oakland but at least there is enough there to show a value of around a Million Five Hundred Thousand ($1,500,000.00) Dollars. At any rate none of these matters were thrashed out at any hearing as no value was ever placed upon the hotel which would seem to be necessary before the consideration of a plan of reorganization could take place.

The plan of reorganization to which we call the attention of the Court is not an inequitable one based upon that value (Trans., p. 110). But, we were perfectly willing to change the plan in any

particulars which would meet the approval of the bondholders. Under this plan of reorganization the bondholders could obtain the property on and after July 1, 1942, if the interest paid to the holders of the bonds did not hold up to expectations. We were also willing to practically turn over the control of the company to the bondholders, as will be seen by reading Article IV of the Plan. We were also willing to escrow all stock of The Charles Jurgens Co., to be turned over to the bondholders in 1945 if the interest did not hold up. These items and dates could easily have been changed in a round table conference but the bondholders committee opposed any such plan from the beginning. Their objections to the Proposed Plan, however, were made before there was a proper procedural compliance with the requirements of the act. The only hearing of any kind after the claims had been filed and approved, was the hearing of June 3, 1935. There was never any abandonment of this property by The Charles Jurgens Co., or the Oakland Hotel Company. They did not relinquish their title. Their property was never foreclosed before this proceeding was commenced. There never was any virtual abandonment of the property. When The Charles Jurgens Co. found it could not advance any more money to carry on the hotel, it was about to close it but the Chamber of Commerce of Oakland asked them to keep it open until they could find a lessee. They finally hit upon E. C. Wood & Co., who proceeded to gut the hotel of its equipment and then went bankrupt. It

became necessary to bring foreclosure proceedings in order to terminate their lease. There never was any abandonment either physical or legal of the property. This Court is not interested in abandonment any way because at the time that the proceeding was commenced under 77B, the Oakland Hotel Company were still owners of the property. But what occurred at this time will be found by reading the testimony of Mr. Jurgens and the copies of the minutes of The Charles Jurgens Co., (Debtor's Ex. 20). The testimony of Mr. Jurgens with reference to the closing of the hotel and the circumstances thereof will be found in the latter part of this testimony (Trans., pp. 372-375).

During the period when Mr. Jurgens was managing the property for the Oakland Hotel Company, $90,000.00 worth of bonds were retired. His standing as a hotel man is attested to by leading hotel men of the state as will be observed by the record who testified as to the esteem in which he was held. He was also a member of the National Committee of Hotel Men consisting of five men in the United States operating under the N. R. A. The hotel went through the period of depression like the other prominent hotels of the country. It was the center of the civic and social life of Oakland and it could be made so again with the proper handling. At least the attempt should be made for the sake of the bondholders as well as of the debtor. If it is found that this is impossible within the next seven years,

then the property could be relinquished to the bondholders but the real estate value will probably have increased in the meantime and the building is so solidly and massively built that it cannot deteriorate to any extent during that period. (See testimony of Frisell (Trans., p. 355).) This brings us to the purpose of Section 77B of the Bankruptcy Law.

THE PURPOSE OF 77B OF THE BANKRUPTCY LAW.

Section 206 of U. S. C. A., Bankruptcy, Title 11, provides:

> "Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in section 207 of this chapter. (July 1, 1898, c. 541, Sec. 77A, as added June 7, 1934, c. 424, Sec. 1, 48 Stat.)"

The act, then is primarily for the relief of the debtor but the secured creditors, bondholders and the unsecured creditors are certainly not to be neglected. If the only purposes we could see in this proceeding were to delay the creditors from obtaining their just claims, there would be no appeal in this case. If we could see no equity in the debtor there would be no appeal. If we could see no prospect of this hotel property to build up revenue within the next seven years, there would be no ap-

peal in this case. The purpose of the act has been well defined in a number of decisions. It is not even necessary that there should be an equity before a plan of reorganization is approved. Section 77B was not enacted only for the benefit of corporations in embarrassed circumstances but for corporations who were insolvent. The constitutionality of the act has been upheld in a number of cases.

In re Central Funding Corporation, 75 Fed. (2d) 256; See latter part of opinion, p. 261.

Also:

In re Prudence Bonds Corp., 75 Fed. Rep. (2d) 262;

In re New Rochelle Coal & Lumber Co., 77 Fed. (2d) 881.

We wish particularly to quote from the case referred to by this Court in the recent case of *San Francisco Building Coporation* v. *Battson, supra*:

Central States Life Insur. Co. v. *Koplar,* 80 Fed. (2d) 754, at p. 759-760:

"In this situation and before any action had been taken on the proposed plan of reorganization and while a motion of appellant to modify the order classifying creditors was pending, this appeal was taken. The appeal is from an order denying the appellant to foreclose its deed of trust on the Park Plaza Hotel properties, and is bottomed on the propositions: (a) That since the first liens of appellant are valid and undisputed, (b) since the debtor has no equity in the above properties over and above

the first and second deeds of trust thereon, and (c) since said properties are therefore burdens on the estate of the bankrupt, appellant has an absolute right to foreclose under the provisions of section 77B, outside of the bankruptcy court, and so the denial of this right of foreclosure by the court *ni si* was error. And this denial is the sole error urged for reversal."

* * * * * *

"For the major part the cases urged on us as controlling arose under the Bankrupt Act (11 U. S. C. A.) as it stood prior to the enaction of section 77B. It is not only clear, but there is controlling authority for the view, that the above section worked a rather radical change in the law on the precise question before us here. Continental Ill. Nat. Bank vs. Chicago, Rock Island & P. R. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110.

In the above case it was said (294 U. S.) 648, at page 676, 55 S. Ct. 595, 606, 79 L. Ed. 1110): 'It may be that in an ordinary bankruptcy proceedings the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under Section 77 (11 U. S. C. A. Sec. 205) is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim

of the section, and thereby to render its provisions futile.' * * *

The record shows that when the order here complained of by the appellant was entered, a plan of reorganization was pending, undisposed of; likewise a motion made by appellant to reclassify creditors was pending. The record discloses that there would not be any equity for any other creditor, secured or unsecured, in the Park Plaza Hotel, over and above the sums due on the first, the supplemental chattel, and second mortgages thereon, and even as to the second mortgage there would be a deficit, whereof the amount had not yet been ascertained. The trend of the hardly disputed evidence was that it would cost now to reproduce the Park Plaza Hotel well-nigh what it cost to build and furnish in 1929 when it was constructed. And so the estimated fair value of the hotel and its furnishings exceeds by $500,000 the aggregate of outstanding bonds in both the first and second mortgages. The evidence conclusively showed that there is now, that is when the order was entered, no market whatever for this hotel. So, it is not difficult to see that if sold now, no one except appellant could be or would be a bidder at such sale, and an unnecessary sacrifice of value would occur, with the result that the deficiency to be allowed in favor of appellant as a general creditor would be shockingly unjust to the estate and to other unsecured creditors, as also to the holders of bonds secured by the second mortgage. Even by the proposed plan pend-

ing before the court, the claims of these latter bondholders were not definitely fixed. As to them the proposed plan merely said: 'The holders of the said second mortgage bonds have claims against the debtor in excess of the value of their securities. The amounts of their claims should be determined and adjudicated in the proceeding herein in accordance with the provisions of section 77B of the amendment to the Bankruptcy Act. When the amounts of the claims of the second mortgage bondholders in excess of their securities have been thus determined, the said claims will be treated as claims of general creditors and the said bondholders will be entitled to participate in the provision made for general creditors as hereinafter provided.'

Moreover, it seems clear from the language and provisions of section 77B, supra, that the approval and confirmation of the proposed, or any, plan of reorganization is a matter of the bankruptcy court. Proposal of a plan rested with those empowered by the act to propose, but disposal rested with the court. Certainly is this true of a plan not yet accepted by any party, or class interested, save by implication the debtor alone, which presented it. The question whether a plan, accepted by every part in interest and by the requisite number of each class of creditors, yet leaves any discretion as to approval by the bankruptcy court, is not involved here; for this is not the case presented."

This case is the nearest of any which we have found to the facts herein presented. The lower

court, then seems to have the discretion to determine what is an equitable plan of reorganization under Section 77B but this discretion was never exercised in the present case. Instead of that, the proceeding was summarily dismissed. We come, then, to the proposition that the court erred in not having any hearing or making any determination as to the feasibility or fairness of the plan proposed or of any plan.

THERE WAS NO HEARING OR DETERMINATION OF A PROPOSED OR ANY PLAN OF REORGANIZATION

The only hearing was that of June 3, 1935 (Trans., p. 409), at which the proposed plan was not even discussed and the plan proposed by the Reconstruction Finance Corporation was not even given any consideration. The debtor's attorney was not even permitted to question the bondholders committee as to the acceptibility of the plan proposed by the Reconstruction Finance Corporation, the only thing in the mind of the Master and of the attorneys for the creditors was a summary dismissal of the proceeding. It is not necessary to quote here again the proceeding before the local Reconstruction Finance Corporation. That will be found in the proceedings of Monday, June 3, 1935, before the Master, although the number of letters now in evidence among the original exhibits show that the bondholders committee was willing to consider a

proposal of $400,000, cash, for the bonds or even payments in installments. They would not agree to this before the Master. They were sure the proceeding would be dismissed. The Master mistook the rules of the Reconstruction Finance Corporation and said that the Reconstruction Finance Corporation should make the proposal of a loan before the Master. This Court knows that the Reconstruction Finance Corporation does not proceed in that way. The bondholders would have to agree to accept a certain amount for their bonds. Then the Reconstruction Finance Corporation would consider whether they would loan that amount on the Hotel Oakland. The local committee gave every encouragement to the debtor to proceed for an application for his loan but this was stopped by the bondholders committee. The Master would not even permit an examination to be made by the attorney for the debtor, of the bondholders committee or the president of the Central Bank of Oakland as to what they would recommend to the bondholders. The proposed plan was never discussed. It seemed a futility to discuss it under these circumstances so the recommendation was made to dismiss.

REPORT OF SPECIAL MASTER OF JUNE 6, 1935, RECOMMENDING DISMISSAL.

(Trans., p. 170.)

There are no findings of fact in this report or any conclusions of law. We submit that the follow-

ing is not a compliance with the reference.

"At the first hearing before me, Mr. Jurgens, the President of Oakland Hotel Company, stated that he thought he might be able, if given time, to procure money with which to satisfy the bondholders to an extent that would induce them to approve a plan of reorganization. Upon this slim promise, and with the idea of giving this company every possible opportunity to rehabilitate itself, the matter was continued and has been continued until this date. There seems to me to be no reasonable propect that sufficient money can be raised to satisfy the bondholders and that owing to the long period of time which has elapsed since the proceedings were first begun, the accumulated interest which has been unpaid and the fact that so far no real progress seems to have been made in securing money with which to effect a reorganization, and the fact, which I believe to be true, that new money must be secured if a reorganization is to be effected, I think the proceeding should be dismissed and that the bondholders should be permitted to pursue their remedy in the state court. The state court is entirely competent to foreclose the mortgage in the proceeding now pending before it. To continue the matter in the hands of the Federal Court, it seems to me, would simply result in enlarging the expense already accrued and would result in no benefit to the debtor. I was advised at the time of the hearing that it would take three or four months to foreclose the mortgage in the state court and thus this additional time would be secured to

the debtor by such proceedings, whereas, if liquidated in the bankruptcy court, the sale of the property would be very much more speedy and the debtor would be deprived of time he might have if the matter were returned to the state court, where it originated. Nor will an adjustment between the bondholders and the debtor be prevented by such return of the proceedings to the state court. It is plain that no adjustment can be made in the Federal Court.

I, therefore, recommend that the proceeding be dismissed and the matter relegated to the state court for such further proceedings as it may see fit to take."

This is purely a summary action upon the part of the Master. In the first place there is no testimony anywhere in the record that Mr. Jurgens stated that he might be able to procure money to satisfy the bondholders. There is no provision in the act for a plan of reorganization which must provide cash to compensate all bondholders. If this were so, it would not be a plan of reorganization. The Master had evidently forgotten the earlier proceedings in the case being continually pressed to dismiss the proceeding and gave way before the onslaught. At any rate it will be apparent to the Court that the Master made no finding of approval or disapproval of any plan of reorganization. He held no hearing and made no finding as to the equity or fairness of the plan. He held no hearing and made no finding as to the value of the property upon which the reorganization could be based. The Master in this case it

seems to us never did conceive the purpose and spirit of section 77B, but it was continually pressed upon him that it was his conscientious duty not to permit any further delay in the foreclosure of the mortgage and that he was withholding property from the bondholders. Whereas, the outcome of a foreclosure will be that the bondholders will receive nothing. That this is not a sufficient report we have ample authority but will only quote the case of *Toledo P. W. R. R. Co.* v. *Peoria, etc., R. R. Co.*, 72 Fed. (2d) 745, at page 747:

> "It is argued that the decree cannot stand because the court did not make findings of fact as provided by Rule 70½ (28 USCA sec. 723). This should have been done by the court or the master. If performed by the master the court should either correct, reject, or adopt such findings as its own. In the case before us the court decreed: 'That the exception filed herein on behalf of Toledo, Peoria and Western Railroad, Toledo, Peoria and Western Railway Company and Samuel M. Russell, former Receiver of Toledo, Peoria and Western Railway Company, be and the same are hereby overruled and the report of said Special Master is hereby approved. * * * '
>
> While the ruling upon the exceptions to the master's report is not proper part of the decree of a court of equity, we are not prepared to ignore the ruling solely because of the place where it appears.

> The trouble in this case is that the master did not make satisfactory findings. He divided his report into five heads: a statement of the case; findings as to law in the case; payment under protest; construction by the parties; and conclusions. Under his conclusions he said; ' * * * I find the issues with the Peoria and Pekin Union Railway Company, the Intervener herein * * * '.
>
> We are not as much interested in the names given to the subdivisions of the report by the master as to the contents thereof. We can ignore the names. The purpose of a reference, if it be to take testimony and make findings of fact and conclusions of law, is met only by the master's careful preparation of findings on all material issues. The findings are far more important than the conclusions."

The Master's report was not prepared in accordance with Equity Rule 46 of the District Court, and he gave no opportunity for proper objections before the filing of the report. In fact, it has been the custom up to the time of the trial of this case, for the Master to proceed under Rule 7 of the Bankruptcy Rules which has no application to an equitable proceeding of this kind. It followed that we had no opportunity to present a request for special finding except in our exceptions to the report after filing, and this could only be taken up by the judge. That these equity rules apply to bankruptcy proceedings has been held in this circuit in the case of *In re Pierce,* 210 Fed. Rep. 389.

Rule 46 of the local court is supplementary to Rule 66 of the Equity rules of the Supreme Court. Proceedings heretofore in these cases have been under an entirely erroneous idea of the functions of the Master. Heretofore, when the Master has filed his report he has done so under Rule 7 of the Bankruptcy Rules and which have nothing to do with this kind of proceeding, and his report was set down the following Monday for consideration and there was no time for proper exceptions.

Rule 7 refers to reports of the referee and petitions for review of orders of the reference covered by bankruptcy rule of the Supreme Court, 27.

Bankruptcy Rule 37 and Equity Rule 61½ apply to this case. Likewise Rule 12, sub. 3 Bankruptcy, Supreme Court, amended April 17, 1933, applies to this case for it provides that the judge may refer an application in proceedings under 77B to a Special Master to ascertain and report the facts. So it appears that local Rule 46 and not local Bankruptcy Rule 7 applies to the procedure in this case. In this case all the references were made to Judge Beasley as Master in Chancery and not by virtue of his office as referee. Any other qualified person could have been appointed. It followed that we had no opportunity to present any objections to the Master's report before it was filed. We could only present the exceptions to the court which was done, and in this instance we called attention to the lack of any findings as to value, or as to the equitableness

or fairness of the plan, to which we were entitled. We also renewed this upon a petition for rehearing.

THERE ARE NO FINDINGS IN THE REPORT OF THE SPECIAL MASTER OF JUNE 6, 1935, BUT ONLY A SUMMARY DISMISSAL OF THIS CASE.

Local Equity Rule 46 which is supplementary to General Equity Rule 66, applies to this proceeding to which we bring the authority of *In re Pierce,* 210 Fed. Rep. 389, and

Continental Ill. Nat'l Bank v. *Chicago, Rock Is. & P. R. Co.,* 294 U. S. 648.

Under that recent decision by the Supreme Court this is an equity proceeding and the decree is an equity decree. The report of the Master herein, therefore, was not in conformity with local rule 46. There was no opportunity given for objections to a draft report or a request for special findings. The answer of the attorney for the creditors is that we did not request any special findings and made no objections to the Master's report. This is an evasion. We had no opportunity to do either of these things as is apparent by the record. The report was filed on June 6, 1935, and placed on the calendar for the next Monday. Our only recourse was to obtain twenty days from the court for exceptions and ask for special findings in the exceptions. This was done but the exceptions to the report were overruled. In this report the plan of reorganization or any plan of reorganization was neither approved or disap-

proved. Its provisions were not even mentioned. There was no finding in this report as to the value of the property or as to the equitableness or fairness of the plan, and no mention made of the proposal of the Reconstruction Finance Corporation. The exceptions were overruled and the report of the Master approved without any findings of fact or conclusions of law by the lower court. We thereupon asked for a rehearing and called the attention of the local court to the requirements of Equity Rule 70½. This was argued at two hearings.

APPLICATION OF EQUITY RULE 70½.

That Equity Rule 70½ applies to this proceeding needs no long discussion. This is an equity proceeding and the decree is an equity decree, as stated above, citing the Chicago Rock Island case. The order entered by the court did not contain in substance or form any findings of fact or conclusions of law (Trans., p. 221).

See:

Toledo, etc., R. R. v. *Peoria, etc., R. R.* 72 Fed. (2d) 745,

already quoted from.

Also:

Meadows v. *Cheshire,* 58 Fed. (2d) 628.

That the case should be sent back for proper findings of fact and conclusions of law.

See:

Borden's Co. v. *Baldwin,* 293 U. S. 213;
Los Angeles Gas. Co. v. *Railroad Commission,* 289 U. S., pp. 327-331;
Siano v. *Helvering,* 79 Fed. (2d) 444.

These are enough authorities on this point as the court is well conversant with the rule. But there can be no proper findings of fact or conclusions of law in this case unless a further hearing is given upon the plan proposed or its modification. There should be a determination of the value of this plant, and we should be permitted in an open discussion with the bondholders to discuss the plan or modifications thereof. It is said that we had full opportunity to do so. Under the circumstances of this case, it appears that we did not, for there was continual pressure to dismiss the case and when the matter was submitted on June 3, 1935, the Master gave us no further opportunity but summarily dismissed the proceeding. It is said that the plan proposed was disapproved by the majority of the bondholders. The bondholders themselves never attended any meetings or hearings. As is usual in these cases they were entirely in the hands of the bondholders committee. As a matter of fact, the bondholders committee still control the majority of the bonds. (See Debtor's Ex. 1, par. sixth.) The bondholders committee still had a lien on all these bonds which was not released. No notices of termination or notices of withdrawal were given by the committee or

by depositors. (Statement of Mr. Beardsley at opening of the case (Trans., p. 258).) They were the virtual owners of the bonds and although they disclaimed any such purpose they continually acted throughout this case for the bondholders. (See Bondholders' Protective Agreement, dated December 21, 1931, Debtor's Ex. 1.)

E. T. Kenney Co., 136 Fed. 451;
Bullard v. *Cisco,* 290 U. S. 179-180.

As far as the stockholders are concerned, 95% of the stock is held by The Chas. Jurgens Co., who authorized this action and the proposal of the plan of reorganization so that the acceptance by the stockholders is of no moment, for the stockholders themselves began the action and proposed the plan.

In conclusion, it is well to say that Section 77B is a remedial piece of legislation. It was passed primarily for the benefit of the debtor, as appears by Sec. 206, USCA, Title 11, Bankruptcy. It is also true that it protects the bondholders as well as the debtor from a forced sale under which none of the parties realize any substantial amount on their interests. To the banks it is revolutionary, perhaps, because under the old system they considered that mortgaged property virtually belonged to them. Attorneys and courts who have been engaged in building up property rights during the years have a difficult time reconciling themselves to this legislation, although it is not necessarily new, moratoriums being known during or after each de-

pression in economic history. It is this opposition, however, which has delayed any effective consideration of any plans in the present case. It is also to be noted that the Jurgens family who invested a large part of their fortune in this hotel and afterwards mortgaged the remainder during the depression to carry it on and see that the tradesmen were paid, had nothing to do with this bond issue (Trans., pp. 369-370). The bonds were issued in 1910 before there was any Blue Sky Law in this state and during that so-called era of wonderful nonsense it was one of the indulgences of the investment bankers to issue bonds and sell them to the public on hotels and apartment houses. They not only sold them to the public but they invested estate and trust funds in these bonds. This happened in this very case. We particularly impress this upon the Court. The record shows that there are a number of trust estates which hold these bonds (Trans., pp. 49-55; pp. 155-158). They will never realize anything if this property is sold on foreclosure. It may be that they will realize return on these bonds if the hotel property is reorganized and recovers its former status in the City of Oakland. At least it is worth trying.

Finally, there has never been any attempt on the part of the Oakland Hotel Company or Mr. Jurgens to delay this proceeding for any purpose other than to be given a chance to restore the hotel to its former state, having an abiding faith that it can be done. The Jurgens company never abandoned the hotel,

but their only relief came when Section 77B was passed. They have been met, however, by a resentment against this Act of Congress as an obstacle in the way of the banks and bondholders committee to secure this valuable property and apply it to their own purposes.

There is another appeal here on the question of attorneys' fees.

PETITION FOR PAYMENT OF ATTORNEY'S FEES AND COSTS EXPENDED BY DEBTOR IN CARRYING OUT THE PURPOSES OF 77B

(Trans., pp. 187, 203.)

In order to support our appeal from the disallowance of any attorneys' fees or any costs or expenses which we have incurred in this proceeding, we also appeal from the Order Allowing $5,000.00 attorneys fees for the creditors. We will not indulge in any long plea for the allowance of these fees. We are more concerned with obtaining justice for the petitioner in bankruptcy here. We were not greatly concerned with the allowance to the attorneys for the creditors as they certainly earned their money as far as the amount of work is concerned. Whether their work will inure to the bondholders or not is another question. Also, the amount of our fee was based upon the amount of work done, which speaks for itself, and upon the proposition that if the attorneys for the creditors were entitled to $5,000.00

for opposing the reorganization, we were entitled to more for carrying the proceeding through and attempting to preserve the property for the debtor as well as the bondholders and for carrying out the purposes of the act. This Court has the power to fix these fees upon a summary appeal and we only ask a reasonable amount based upon the estate of the debtor.

USCA, sec. 207, subdiv. (c), subsec. (9), provides for a reasonable compensation for services rendered and reimbursement for expenses incurred in connection with the proceedings and the plan by attorneys for parties in interest and for the debtor. It now transpires under all the authorities that while those who have had to do with the proposal and reorganization of the company are entitled to fees, the attorneys for creditors and special interests are not entitled to fees out of the estate but must look to their clients.

We content ourselves with citing the following authorities:

In re Wayne Pump Company, 9 Fed. Supp. 940;
In re Kentucky Elec. Power Corp., 11 Fed. Supp. 528;
In re Selton Nat'l Fiber Can Co., 13 Fed. Supp. 83;
In re Kelly Springfield Tire Co., 13 Fed. Supp. 724;
In re Flamingo Hotel Co., 81 Fed. (2d) 749;
In re Hertz, Inc., 81 Fed. (2d) 571;

In re National Lock Co., 82 Fed. (2d) 600.

We content ourselves with quoting the following from *In re Wayne Pump Co., supra*:

> "The attitude of counsel for the committee after the first brush or two in court was conciliatory and constructive, and regardless of the motives of the committee, resulted in a compromise reorganization beneficial to the company, and not prejudicial to the rights of the bondholders. The activities of the law firms were of great value to the estate. Bad advice at this point in the proceedings could very easily have resulted in prolonged litigation with possible appeals and unpreventable delays, which would in all probability have destroyed the very purpose of the act and the reorganization proceedings.
>
> The court is persuaded that counsel, when acting in good faith, should be encouraged to advise and persuade clients whenever possible to assist in and co-operate with, an honest endeavor to reorganize industry, and that they should be assured by the courts that such constructive conduct on their part will meet with reward commensurate with the character of the assistance rendered and the results obtained, rather than that such counsel will be penalized for shortening, instead of prolonging, the court procedure.
>
> On the other hand, the hasty organization of the so-called 'protective committees' who volunteer advice to bondholders and solicit holders of securities not to go along with a company reor-

ganization, suggesting a better method to be proposed and advising the revocation of assents already made, as was done in this case, should, to say the least, be scrutinized carefully by the court when asked to make liberal allowances to the members of such volunteer committee."

Respectfully submitted,

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No. 7986

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OAKLAND HOTEL COMPANY (a corporation),
Appellant,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, CENTRAL BANK OF OAKLAND, KATE M. PALMANTEER, THOMAS A. CRELLIN, JAMES K. MOFFITT, WILLIAM B. FAVILLE, RALPH W. KINNEY, EDMOND A. SOULE and JAMES A. WAINWRIGHT,
Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Page

Introductory Statement 1

Appellees' Statement of the Case..... 3

1. The decree of dismissal was in accord with the express direction of the statute..... 12

2. There is no merit in the appellant's claim that there was no adequate hearing on the proposed plan..... 13

3. There is no merit in the appellant's claim that the findings were insufficient 16

4. None of the appellant's substantial rights were in any way affected by any of the alleged errors in procedure of which the appellant complains..... 21

5. There was no error in the allowance to the bondholders' attorneys 23

6. The court properly refused to make any allowance to the appellant's attorneys 26

Conclusion 29

Table of Authorities Cited

	Pages
American Can Co. v. M. J. B. Co., 52 Fed. (2d) 904	20
American Surety Co. v. Cotton Belt Levee No. 1, 58 Fed. (2d) 234	20
Amiesite Asphalt Co. v. Interstate Amiesite Co., 4 Fed. Suppl. 504	19
Bankruptcy Act, sec. 77B	3, 10, 12, 15, 19, 24, 27, 30
Bradley v. Huntington, 277 Fed. 948	19
Briggs v. U. S., 45 Fed. (2d) 497	20
Corpus Juris., Vol. 7, p. 437	28
Daniel v. Guaranty Trust Co., 285 U. S. 154	19
District Court Rule 46	18, 20
Equity Rule 70½	19, 20, 22
Francisco Corporation Ltd. v. Battson	6
General Order in Bankruptcy XXXVII	19
General Order in Bankruptcy XLII	27
Hoogendorn v. Daniel, 202 Fed. 431	21
In re Celotex Co., 13 Fed. Suppl. 1011	27
In re Crumney, 225 Fed. 426	19
In re Elmore Cotton Mills, 217 Fed. 808	28
In re Flamingo Hotel Co., 81 Fed. (2d) 749	25
In re Goldville Mfg. Co., 123 Fed. 579	28
In re Green, 23 Fed. (2d) 889	28
In re H. W. Clark Co., 79 Fed. (2d) 681	15
In re Hertz, 81 Fed. (2d) 511	24
In re Hughes, 262 Fed. 550	19
In re Kelly Springfield Tire Co., 13 Fed. Suppl. 724	25
In re Kentucky Electric Power Corp., 11 Fed. Suppl. 528	26
In re Markshoe, 289 Fed. 74	28
In re Muriel Holding Co., 75 Fed. (2d) 941	6
In re Selton National Fibre Can Co., 13 Fed. Suppl. 83	25
International Harvester Co. v. Carlson, 217 Fed. 736	19
Judicial Code, Sec. 269	21
Parker v. St. Sure, 53 Fed. (2d) 706	20
Robinson v. Dickey, 36 Fed. (2d) 147	28

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Appellees.

BRIEF FOR APPELLEES.

INTRODUCTORY STATEMENT.

The appellant's brief does not conform to Rule 24 of the Rules of this court. It contains no "concise abstract or statement of the case", as required by sub-paragraph (a) of Section 2, either with or without "presenting succinctly the questions involved and the manner in which they are raised". It contains no "specification of errors relied upon", as required by sub-paragraph (b). And the "brief of the argument" contains no "clear statement of the points of law or fact to be discussed", as required by sub-paragraph (c).

The total absence from the brief of any assignment of errors would appear to justify the disregarding of all alleged errors, as provided in Rule 24, Section 4. And the fact that this brief was filed after the time fixed for oral argument, when it is too late to remedy on argument defects in the printed presentation, would appear to be an added circumstance justifying the invoking of the provisions of the Rule.

Inasmuch as the appellant's statement of the case (if its "Statement of Facts", pages 1-21, is construed as being such a statement) is controverted, we shall present herein a concise statement of the case.

And the appellees' brief of the argument will present the following points, the pages upon which each point is presented being indicated in the subject index to this brief:

1. The decree of dismissal was in accord with the express direction of the statute;

2. There is no merit in the appellant's claim that there was no adequate hearing on the proposed plan;

3. There is no merit in the appellant's claim that the findings were insufficient;

4. None of the appellant's substantial rights were in any way affected by any of the alleged errors in procedure of which the appellant complains;

5. There was no error in the allowance to the bondholders' attorneys;

6. The court properly refused to make any allowance to the appellant's attorneys.

APPELLEES' STATEMENT OF THE CASE.

The appellant repeatedly asserts in its brief that the temporary trustee (who was formerly the receiver appointed by the state court) had opposed and obstructed the appellant's attempted reorganization. No part of the record is cited, and none can be cited, to sustain these assertions.

The appellant repeatedly asserts that the appellees and their attorneys are opposed to Section 77B, and have placed many obstacles in the way of such an orderly proceeding as is contemplated by the section. No part of the record is cited in alleged support of any of these assertions; and we understand that no such support can be found in the record.

The appellant repeatedly asserts that the appellees and their attorneys have consistently opposed *any* reorganization of the appellant, and have placed every possible obstacle in the way of *any* reorganization. No part of the record is cited in alleged support of these assertions, and the record clearly establishes the contrary.

At the close of an extended hearing before the special master, in December, 1934, the special master expressed doubt as to whether he should at that time recommend a dismissal of the debtor's petition, or should give the debtor a reasonable time within which to propose a reorganization plan; he called attention to the fact that the bondholders appearing before him (the present appellees owning $387,000 out of the $660,000 bond issue) probably could prevent reorganization by refusing to accept *any* plan proposed. Mr. Beardsley replied that the bondholders would not

take "any such position"; and the special master responded: "I knew you were too fair to do that" (Record, page 396).

After some further discussion along the same line, Mr. Beardsley stated the position of the bondholders, the appellees here (being the position consistently taken by the bondholders throughout these proceedings), as follows (Record, pages 402-403):

> "All I am interested in here is having this matter over with, organize or no organize, and give an opportunity to save as much as we can for the secured creditors * * * It does not make any difference to us whether this petition is dismissed * * * or whether you recommend that the debtor be given a time that may be suggested, a reasonable time, to present a plan to determine whether or not it is to continue further. In other words, I have no objection to the debtor's presenting a plan * * * We want to hear it, but we want to hear it quickly. In other words, we have sat by for three and one-half years and we have suffered with this property, we have worked for it * * * Now we say, that having sat by for three years and longer, while we have been trying to make these bonds worth a little more than thirty cents on the dollar, that if they have anything to say about saving us, for God's sake say it and get it over, and, if they haven't, get out of the way, and let us finish up the job we started three years ago."

Mr. Van Fleet replied (Record, page 404):

> "That is all very agreeable to me, if your Honor please."

And the special master replied (Record, pages 404-405):

> "That simplifies the matter * * * The truth of the matter is that (the) creditors * * * have been forebearing and have tried to give you a chance to work something out. I cannot help feeling that there is a limit to patience * * * I will be glad to take up with you tomorrow as (to) the time I should give you within which to present your plan."

Mr. Van Fleet replied (Record, page 405): "Very good". The time required was discussed with counsel; and by consent the debtor was given the full time requested by its counsel, within which to present its proposed reorganization plan (note that in its original petition, filed on October 18, 1934, the debtor had alleged that it then had "a tentative plan of reorganization that it will present to the court at the proper time"; Record, page 14).

The foregoing portions of the record furnish a complete answer to the appellant's claim that the appellees have prevented the appellant from availing itself of the provisions of Section 77B, and have opposed any and all reorganization, and that the appellant has had no opportunity to present a reorganization plan as contemplated by Section 77B.

Having been given all of the time that it had requested, the appellant presented its proposed reorganization plan (Record, pages 110-119).

This plan, the only one ever presented, is one that could not be approved by the court, under any circumstances.

Obviously, it could not be approved as a plan accepted by *two-thirds* of the secured creditors, since the appellees, owning a *majority* ($387,000 out of $660,000) of the bonds, expressly rejected it. Furthermore, not a single bondholder accepted it; and, after the bondholders' claims had been proved and at the hearing on the proposed plan, owners of $411,000 of the bonds voted "no" on the proposed plan (Record, pages 412-413). And, although the special master asked counsel for any acceptances by stockholders, Mr. Van Fleet refused to file any such acceptances (Record, page 413).

Consequently, the proposed plan could not possibly be approved, pursuant to subsection (e) (1), as one "accepted in writing" by two-thirds of each class of creditors, and by a like percentage of stockholders. The only possible chance for approval was under subsection (e) (1) (c), upon the theory that "provision is made in the plan for the protection of the interests, claims, or liens", and upon a finding, as provided in subsection (f), that "it is fair and equitable and does not discriminate unfairly", etc. The plan could not be approved, unless the provisions made for the bondholders were "completely compensatory" (*In re Muriel Holding Co.,* 75 Fed. (2d) 941; *Francisco Corp. Ltd. v. Battson,* decided by this court, Mar. 17, 1936).

Nowhere in the appellant's brief is there any suggestion that its proposed plan could be approved upon the theory that it was "completely compensatory", or upon any other theory; and a brief reference to the plan (Record, pages 110-119) will demonstrate that

it could not be approved upon any theory. In this connection, the following features of the proposed plan are controlling:

(1) It provides for a waiver for *fifteen years* of all provisions of the bond indenture for amortization, retirement and redemption of bonds (Record, page 112, Art. II, sec. 2);

(2) It provides for an extension of *fifteen years* of the due date of the $660,000 principal evidenced by the bonds (Record, page 115, Art. VI, sec. 1);

(3) It provides for an extension for *fifteen years* of the due date of the $205,000 past due interest (Record, page 115, Art. VI, sec. 1);

(4) It provides for a *reduction* of the 6% interest to 3% for seven and one-half years, to 4% for two years, and to 5% for six years—*a total reduction of interest in the sum of $214,500* (Record, page 113, Art. II, sec. 6);

(5) It provides that *the payment of even this interest,* reduced to the extent of $214,200, shall for five years be *dependent upon the success of the hotel* under the appellant's management (Record, pages 112-113, Art. II, secs. 3, 4, 5);

(6) It provides for *taking from the bondholders the possession and control of the bondholders' security,* and for placing it in the control of the debtor until July 1, 1942, even though in the meantime not one cent of interest or taxes is paid by the appellant (Record, page 113, Art. II, last paragraph);

(7) It provides that during this period, during which the appellant need not pay either any interest or any taxes, *it can borrow* (Record, page 115, Art. IV, sec. 4), *presumably using the bondholders' inadequate security as security for such borrowing,* and that it can continue thus to possess and to borrow on the bondholders' security (without paying taxes or interest), until July 1, 1942 (Record, page 113, Art. II, last paragraph).

All that the proposed plan offers to the bondholders, in lieu of their rights and interests of which it proposes thus to deprive them, is the following:

(1) 6600 shares of worthless common stock of the appellant (Record, page 114, Art. III, sec. 3);

(2) A minority participation in the appellant's management of the hotel (Record, page 115, Art. IV, sec. 1);

(3) The bulk of the remainder of the worthless stock after ten years, if the debtor does not pay interest equal to 6% (3% per annum) for the years 1943 and 1944 (Record, pages 114-115, Art. III, sec. 4).

Obviously, the proposed plan does not make any provision for the bondholders that is "completely" or otherwise "compensatory". It is neither "fair" nor "equitable"; it fails to provide "adequate" or any "protection for the realization" by the bondholders "of the value of their interests, claims, or liens"; and it is not "feasible". It merely provides for the use by the appellant of the bondholders'

inadequate security, in an undertaking that would be extremely hazardous for the bondholders, in a vague hope of salvaging something for stockholders, whose equities have been long since completely dissipated by the same management that it proffers to the bondholders.

The appellant suggests that the failure of its management was simply the natural result of the depression; and yet its own financial statements show that in the boom year of 1929 it lost $131,670.11, that it lost $163,628.19 in 1930, and that it lost $65,677.51 during the first four months of 1931 (Record, page 78).

The appellant has much to say about the propriety of giving it an opportunity to protect its "equity". And yet it is perfectly plain that it has no "equity".

All of its property is subject to the lien of the bond indenture; and the appellant expressly admits that the security is insufficient to pay the bond indebtedness in full. Thus, Mr. Jurgens testified (Record, page 380) that he considered that all accrued interest on the bonds "was already lost"; and, in the proposed reorganization plan (Record, page 114), the appellant refers to the interest accrued on the bonds as "lost interest since 1931". Furthermore, the appellant alleges in its petition (Record, page 11) that the bonds are "now selling at thirty cents on the dollar", which is less than the delinquent interest. And, in its brief (pages 30, 37), the appellant says that, if the bond indenture is foreclosed in the usual way, "the bondholders will receive nothing".

Under the foregoing circumstances, it appears to be a bit incongruous for the appellant to seek the aid of the courts to save its "equity". Admittedly, there is no "equity"; admittedly, the security is inadequate to protect the bondholders—those who have the first legal and moral right to that security. The pendency of these proceedings simply costs the bondholders money, and interferes with their exercise of their legitimate right to realize upon their security, and to minimize as much as possible their admitted and inevitable loss.

The appellant's "Statement of Facts" contains recitals of alleged grievances that serve no purpose, except perhaps to create an atmosphere. These recitals do not present "succinctly" or at all "the questions involved", or "the manner in which they are raised" (Rule 24, section 2, a). These recitals do not indicate that the questions suggested were raised at all in the lower court, or that they present any alleged reason for a reversal of the decree.

We have already referred to the appellant's alleged grievance, because of the alleged opposition of the temporary trustee, because of obstacles we are alleged to have put in the way of the appellant's realization of the benefits contemplated by Section 77B, and because of our alleged opposition to *any* reorganization.

The appellant complains (page 7) because the court appointed Mr. Beardsley attorney for Mr. Barker as temporary trustee, Mr. Beardsley having been attorney for Mr. Barker as receiver, and also one of the attorneys for the bondholders. But it is

not indicated that the appellant raised any question below in reference to this appointment, or that the appellant's alleged grievance in this regard has any pertinency upon this appeal.

The appellant complains (page 11), because, when at the appellant's request we attended a conference at the local office of the Reconstruction Finance Corporation, we "refused to commit" ourselves as to "how much the bondholders would take in cash or cash and stock for their claims", disregarding the fact that obviously we had no authority thus to bind the bondholders.

Apparently the appellant endeavors to make it appear that it had some proposal or commitment from the Reconstruction Finance Corporation, which the bondholders refused to consider. However, the record simply shows that the appellant approached the local representatives of the corporation, and that they gave it a courteous hearing (Record, pages 415-421). As pointed out by the Special Master (Record, page 426) it was merely shown that "Mr. Van Fleet thinks there is a possibility he could secure money from the Reconstruction Finance Corporation". The Special Master pointed out that, "if there were any commitment here to any particular amount or distinct recommendation to the Reconstruction Finance Corporation or its subsidiary organizations to actually lend the money, that it would lend any particlar amount on the property, then there would be something for Mr. Beardsley and Mr. Gregory to take up with their clients". Mr. Van Fleet replied: "That cannot be done until they agree what they will recommend to

the bondholders". The Special Master replied (Record, page 427): "I am not inclined to force them into a position to do that. I will not tell them that they must make an offer to you. You see, you are the person here who is to put up the plan of reorganization; you put one up; that has been rejected, it has not been approved at least. Now, you have no other plan to offer".

There is nothing in the appellant's alleged grievance, because of the reception given to its suggestion that it might secure a loan from the Reconstruction Finance Corporation, that lends any support to its appeal from the decree of dismissal.

Having presented the foregoing statement of the nature of the case, we shall now present the brief of the appellees' argument, setting forth our reply to the points made in the appellant's brief, and the reasons why the decree should be affirmed, under the headings mentioned in our introductory statement, supra, and on the pages indicated in the subject index.

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1. THE DECREE OF DISMISSAL WAS IN ACCORD WITH THE EXPRESS DIRECTION OF THE STATUTE.

Section 77B, subsection (c) (8) provides that, "if the plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and accepted, is not confirmed", the judge "may, after hearing * * * either extend such period or dismiss the proceeding under this section" * * *

A reorganization plan was proposed. A time was duly fixed, within which it might be accepted; and the appellant makes no complaint that the time was inadequate. The plan was not accepted by the required two-thirds of the creditors and stockholders, or by any of the creditors or stockholders. The plan proposed was not confirmed; and it was not a plan that could have been confirmed. Because of the absence of both an acceptance and a confirmation, the statute says that the judge could "dismiss the proceeding"; and it was dismissed as provided in the statute.

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2. THERE IS NO MERIT IN THE APPELLANT'S CLAIM THAT THERE WAS NO ADEQUATE HEARING ON THE PROPOSED PLAN.

The appellant complains that there was no hearing on its proposed reorganization plan (pages 26-27). But the record does not support the claim.

The proposed plan was presented on February 14, 1935 (Record, pages 110-119). On March 6, 1935, it was set for hearing on March 26, 1935 (Record, pages 119-121). Notice was duly given of the hearing (Record, pages 121-127), in the manner agreed to in writing by the appellant (Record, page 119). The bondholders' written opposition to the plan was filed on March 20, 1935 (Record, pages 128-131).

Thereafter, there was due reference to the special master who had already conducted a full hearing in December, 1934, and further notice was given, and

various hearings, formal and informal, were conducted by him (Record, pages 407-409).

Finally, on June 3, 1935, there was a hearing before the special master (Record, pages 409-439) pursuant to notice duly given.

At the June 3, 1935, hearing, the special master asked if the reorganization plan was regularly before him for "consideration at this time"; Mr. Beardsley replied that it was, and Mr. Van Fleet did not reply (Record, page 412). Thereupon, the hearing proceeded. The bondholders made a showing that bonds of the face value of $411,000 were proved by formal claims on file, with powers of attorney running to the attorneys for the appellees, and that the holders of all of these bonds voted "no" on the approval of the proposed plan (Record, pages 412-413). The showing was further made that there was no acceptance on file by any creditor or by any stockholders (Record, page 412). There was the discussion as to the possibility of securing a loan from the Reconstruction Finance Corporation, which discussion was referred to in our statement of the case, supra.

The appellant made no showing whatever in support of its proposed plan; in fact, every one conceded that the proposed plan was acceptable to no one except to the appellant. The appellant confined its showing to one in support of further delay so that it might carry on further negotiations for a Reconstruction Finance Corporation loan (Record, pages 413-431).

Counsel for the bondholders insisted that there had already been too much delay, that the appellant had

already been given much more time to present a reorganization plan or plans than it had theretofore stipulated would be sufficient, and that the matter should be presently disposed of (Record, page 422).

Finally, the following discussion took place between the special master and counsel (Record, page 435):

> "The Master. I have not made up my mind what my recommendation is going to be yet.
>
> Mr. Van Fleet. *I don't want to take any more time.*
>
> The Master. If it is submitted, I will decide on Friday.
>
> Mr. Van Fleet. *Submitted as far as I am concerned.*
>
> Mr. Beardsley. As far as we are concerned."

(The italics here, and elsewhere herein unless otherwise stated, are ours.)

In re H. W. Clark Co., 79 Fed. (2d) 681, was a proceeding under Section 77B. Appealing bondholders complained that they were given no opportunity to be heard on the approval of the proposed reorganization plan. The court pointed out however that they gave no notice of their desire to be heard, or to introduce further evidence; and the court concluded (page 684):

> "It is clear from the facts stated that no opportunity was *denied* appellants to be heard on the issues referred to or any pertinent issue."

All that was lacking in the hearing on the proposed reorganization plan was that no one said anything *in favor* of the proposed plan. In fact, the appellant does not say anything in favor of its proposed plan, even in

its brief. When the matter was regularly set and noticed for hearing, the appellant (the moving party) made no showing whatever, and agreed that the matter might be *submitted* without any showing in favor of the plan, and upon the showing of unqualified and unanimous rejection by the bondholders. It should be perfectly obvious that the appellant has no right upon appeal to urge that the special master erred in not giving it any further hearing. It received all the hearing that it asked for; and it does not now suggest that, even if it had asked for more and received what it asked for, it could have made *any* showing in favor of its proposed plan. The plan was so palpably unsound and unfair that it could not have availed the appellant anything, regardless of the length of the hearings thereon, if it had requested further hearings.

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3. THERE IS NO MERIT IN THE APPELLANT'S CLAIM THAT THE FINDINGS WERE INSUFFICIENT.

The appellant objects to the form of the reports of the special master, and particularly to the absence of special findings. The appellant fails to indicate, however, any issue as to which there should have been any special finding, except only that the appellant asserts that the special master should have found the value of its "equity".

In our statement of the case, supra, we have pointed out that, under the undisputed and admitted facts, there is no "equity".

Furthermore, the special master found in substance that there is no "equity". We refer to the finding in

the report of December 27, 1934 (Record, pages 89, 91):

> "2nd. Paragraph III of the creditors' answer is true. That is to say, the bonds owned by the creditors stated in said Paragraph III are of the face value of $387,000 *and that said creditors have provable claims which amount in the aggregate in excess of the security held by them (namely, the security of said bond indenture) to more than $1,000.*"

This finding was rendered necessary, because the answering creditors were all bondholders, and were not otherwise creditors, and because Section 77B, subsection (a), only permitted answers by creditors "who have provable claims against any corporation which amount in the aggregate, *in excess of the value of securities held by them*, if any, to $1,000 or over".

Paragraph III of the bondholders' answer alleged the excess of the indebtedness over the value of the security; and the issue was fully tried before the special master.

The only experienced appraiser who testified was R. W. Kittrelle (Record, pages 266-272); and he fixed the reasonable market value of the hotel property at $526,000 (Record, pages 267-268). It was subject to tax liens, and to the bond indenture securing bonds in the principal sum of $660,000, besides four years (now nearly five and one-half years) of delinquent interest.

Therefore, there was an adequate finding by the special master that the value of the entire property of the appellant was less than the amount of the tax and bond liens. And there is no basis for the appel-

lant's complaint that the special master did not find the value of its "equity"—in effect, *the special master found that there was no equity;* he found what Mr. Jurgens admitted in his testimony (by his admission that the delinquent interest was "already lost") and what is admitted in the reorganization plan (by the reference to "lost interest"), and in the appellant's petition (by its allegation that the bonds were selling "at thirty cents on the dollar"), and in the appellant's brief (by its assertion that upon foreclosure "the bondholders will receive nothing").

If there were anything lacking in the findings, either as to the value of the hotel property or otherwise, the appellant waived its right to complain thereof, because it failed to request any special findings.

The appellant's brief expressly admits (pages 31, 33) that Rule 46 of the Rules of the local District Court applied to this proceeding.

This rule provides that the master's report "may be in the form of an opinion"; and the master's reports were in that form (Record, pages 89-97; 170-174).

This rule provides further that, *"if requested by either party",* the master's report shall "embody special findings * * * upon the ultimate or probative facts in issue" * * * *The appellant requested no special findings;* and, therefore, it waived its right, if it had any, to any further finding as to the value of the hotel property, and to any further special findings on any other issue.

The appellant objects because the District Court did not make findings as provided in Rule 70½ of the Equity Rules.

This rule applies to "deciding suits in equity". General Order XXXVII makes the Equity Rules applicable *"In proceedings in equity,* instituted for the purpose of carrying into effect the provisions of the act", namely, the Bankruptcy Act, "or for enforcing the rights and remedies given by it" * * *

Appellant cites no authority holding that the Equity Rules apply to the summary proceeding provided for in Section 77B. In *In re Crumney,* 225 Fed. 426, 428, the court held that the above general order *"applies only to equity proceedings, properly so called,* and not to summary proceedings in bankruptcy like this", and that, in summary proceedings in bankruptcy, "the court is not limited by the technical rules of procedure in equity".

The following cases are to the same general effect:

Bradley v. Huntington, 277 Fed. 948, 950;

In re Hughes, 262 Fed. 550;

International Harvester Co. v. Carlson, 217 Fed. 736;

Daniel v. Guaranty Trust Co., 285 U. S. 154, 163-164, 76 Law. Ed. 675, 681.

But, if the general order applies to such proceedings as this, it is abundantly settled that the court's findings may be in the form of an opinion:

Amiesite Asphalt Co. v. Interstate Amiesite Co., 4 Fed. Suppl. 504;

American Can Co. v. M. J. B. Co., 52 Fed. (2d) 904;
Briggs v. U. S., 45 Fed. (2d) 497;
Parker v. St. Sure, 53 Fed. (2d) 706.

The decree of the court confirmed the reports of the special master (Record, pages 221, 222); and these reports, in the form of opinions, were a sufficient compliance with Rule 70½, if that rule is applicable to this proceeding.

Furthermore, if the appellant was entitled to further findings, it waived them by failing to request them seasonably.

Such a waiver is impliedly provided for by local Rule 46, requiring special findings "if requested by either party".

And, in *American Surety Co. v. Cotton Belt Levee No. 1,* 58 Fed. (2d) 234, 235, the court ruled:

> "The request for findings and conclusions filed after the court had acted is unavailing as coming too late."

We respectfully submit that there is no merit in the appellant's complaints that the findings by the special master were not more full and complete, either on the issue as to the value of the appellant's "equity" or otherwise, or that the court did not make findings in addition to those made by the special master.

4. NONE OF THE APPELLANT'S SUBSTANTIAL RIGHTS WERE IN ANY WAY AFFECTED BY ANY OF THE ALLEGED ERRORS IN PROCEDURE OF WHICH THE APPELLANT COMPLAINS.

Even if there were any technical merit in any of the appellant's objections to the procedure either before the special master or before the District Court, this circumstance would not justify a reversal of the decree dismissing the petition.

Section 269 of the *Judicial Code* (28 U. S. C. A. sec. 391) provides that judgment on appeal shall be given "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties".

This court said in *Hoogendorn v. Daniel,* 202 Fed. 431, 433:

> "Unless it can be seen that prejudice has resulted from error in the trial court, prejudice will not be presumed."

Even if there were a prima facie presumption of prejudice from error, the undisputed facts definitely establish that none of the appellant's substantial rights were in any way affected by the alleged defects in the procedure, of which it now complains.

No further hearing on the proposed reorganization plan, no matter how prolonged that hearing may have been, could have resulted in a confirmation of that plan by any decree of the court, because it was utterly impossible for the appellant to secure an acceptance of the plan by 66⅔ of the secured creditors ($411,000 out of $660,000, or 62%, expressly rejected the pro-

posed plan), and because the plan, not being "completely" or otherwise "compensatory", could not be confirmed by the court without the bondholders' consent. Therefore, no "substantial rights" of the appellant were affected by the inadequacy, if any, of the hearing on the proposed plan.

No finding that either the special master or the court could have made, either relating to the value of the appellant's "equity", if any, or otherwise, could have resulted in an acceptance or confirmation of the proposed plan, or in any other termination of the proceedings, except a termination by a decree of dismissal. Therefore, no "substantial rights" of the appellant were affected by a deficiency, if any, in the findings.

This proceeding was one of the first prosecuted under Section 77B in this particular District Court. Neither the court, nor the special master, nor the parties, had the benefit of any well-defined rules of procedure, established either in that court, or in any other court, or otherwise. The appellant's present points as to appropriate procedure are in the main, if not wholly, simply the result of afterthoughts, all suggested on purely technical grounds, for the purpose of prolonging proceedings that can serve no useful purpose, and that have already been prolonged much too long.

Because the alleged errors in procedure do not affect the appellant's "substantial rights", and irrespective of the lack of technical merit in the appellant's complaints as to the procedure, such complaints

furnish no possible justification for a failure to affirm the decree dismissing the appellant's petition.

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5. THERE WAS NO ERROR IN THE ALLOWANCE TO THE BONDHOLDERS' ATTORNEYS.

Chickering & Gregory and Fitzgerald, Abbott & Beardsley, attorneys for the bondholders, petitioned the court for an allowance of $5000 compensation and $262.20 expenses (Record, pages 187-198). As far as the record shows, no one objected to the granting of the petition; and it was granted (Record, pages 223-224).

Counsel concede (page 38) that counsel for the bondholders "certainly earned their money as far as the amount of work was concerned", and that counsel for the appellant are "not greatly concerned with the allowance". In fact, it is not apparent that the appellant is *at all* concerned with the allowance to the bondholders' attorneys, since it came out of the bondholders' inadequate security, and not out of funds in which the appellant can have any real interest.

It does not clearly appear upon what grounds the appellant asks this court to review the order making this allowance. However, counsel state (page 39) that "It now transpires under all the authorities that * * * the attorneys for creditors and special interests are not entitled to fees out of the estate but must look to their clients"; and they cite a number of recent cases in alleged support of this proposition.

While the authorities cited lend support to counsel's proposition, as far as concerns allowances to attorneys for *"special interests"*, they lend no support as far as concerns an allowance to attorneys for *"creditors"*. And it is an allowance to attorneys for *"creditors"* that is being here discussed.

Section 77B (c) (9) expressly provides for the allowance of compensation and expenses to *"parties in interest* * * * and * * * representatives of *creditors* * * *, *and the attorneys* * * * of any of the foregoing".

The attorneys in question appeared formally upon behalf of bondholders owning $411,000 out of $660,000; they acted upon behalf of *all* the bondholders; and no one else appeared on behalf of *any* of the bondholders. Obviously, the bondholders are "parties in interest", within the meaning of the statute—they are by far the most vitally interested of any parties taking part in the proceeding. Furthermore, they are "creditors", within the meaning of the statute. And these attorneys are attorneys for "parties in interest" and for "creditors".

Instead of lending any support to counsel's claim that allowances may not properly be made to attorneys rendering such services as those rendered by these attorneys, the authorities cited by counsel establish the contrary.

Thus *In re Hertz,* 81 Fed. (2d) 511 (cited by counsel as 571), laid down the rule that the lower court has a "very broad discretion" in awarding and in refusing to award compensation, and that it is proper to reward "faithful and necessary service with reason-

able compensation". It also pointed out that compensation should not be allowed for service rendered "strictly in the interest of an individual or group of individuals"; and it declined to interfere with the discretion of the lower court in refusing to make any allowance to attorneys for a particular group of creditors, because it could not say that the services of such attorneys did not fall in this latter class. The court concluded:

> "Every case must stand upon its own bottom and is subject to the exercise of a sound judicial discretion by the trial court, subject to review in the event of abuse".

In re Flamingo Hotel Co., 81 Fed. (2d) 749, cited by counsel, simply affirmed an order denying compensation to an *architect* for *unauthorized* services.

In re Selton National Fibre Can Co., 13 Fed. Suppl. 83, cited by counsel, simply held that no allowance should be made to attorneys who rendered service in furthering the *personal interest of an individual creditor.* The court said on page 85:

> "Services that are to be compensated by the debtor are those rendered primarily and directly for the purpose of effecting a rehabilitation of the debtor, *and, if that is found to be impossible, then in preserving the assets* for liquidation, and not services rendered in the interest of some individual stockholder or creditor".

In re Kelly Springfield Tire Co., 13 Fed. Suppl. 724, cited by counsel, makes liberal allowances to attorneys for all parties, and lays down the rule (page 729) that

> *"just allowances must be made to those who have performed services which have inured to the benefit of the parties in interest".*

And *In re Kentucky Eectric Power Corp.,* 11 Fed. Suppl. 528, cited by counsel, held that the attorneys for the bondholders were entitled to an allowance of $7500.

None of the cases cited by counsel lend any support to their suggestion that the allowance to the attorneys for the bondholders in this proceeding was improper. Furthermore, the cases cited furnish sufficient authority for such allowance, if any authority were necessary in addition to the express authorization contained in the statute. In any event, there is no pretense of any showing, either of any abuse of discretion in the making of the allowance, or that the appellant did not expressly consent to the making of the allowance, or that the appellant, which concedes that it is "not greatly concerned with the allowance", is at all concerned with the allowance.

We respectfully submit that the order making the allowance of compensation and expenses to the attorneys for the bondholders should be affirmed.

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6. THE COURT PROPERLY REFUSED TO MAKE ANY ALLOWANCE TO THE APPELLANT'S ATTORNEYS.

Robbins & Van Fleet, the attorneys for the appellant, filed a petition asking for $10,000 compensation

and $420.60 expenses (Record, pages 203-207). The bondholders filed written opposition to the making of any allowances whatever to these attorneys (Record, pages 215-221). And the petition was denied (Record, page 224).

The petitioners, Robbins & Van Fleet, have not appealed; but Oakland Hotel Company, their client, has included the denial of its attorneys' petition among the matters of which it complains (pages 38-39). However, neither argument nor authority is presented in support of the complaint of this denial.

Two sufficient reasons why the petition was properly denied were pointed out in the bondholders' opposition (Record, pages 216-219, 220-221), and may be briefly listed as follows:

(1) The petition does not comply with General Order in Bankruptcy XLII, in that it is accompanied by no affidavit as required by that General Order. It is there provided: "In the absence of such affidavit * * * no allowance of compensation shall be made * * *". In a recent 77B proceeding, *In re Celotex Co.*, 13 Fed. Suppl. 1011, 1015-1016, it was held that the absence of the affidavit precluded the granting of compensation.

(2) It is undisputed that there is no estate from which any allowance of compensation or expenses could be made except the bondholders' inadequate security; and the law is definitely settled that the attorneys for the debtor cannot be compensated out of such security:

7 *Corpus Juris,* page 437(78) and 438(83), section 782;
In re Goldville Mfg. Co., 123 Fed. 579;
In re Elmore Cotton Mills, 217 Fed. 808;
In re Markshoe, 289 Fed. 74;
In re Green, 23 Fed. (2d) 889;
Robinson v. Dickey, 36 Fed. (2d) 147.

Furthermore, as shown by the authorities discussed in the next preceding subdivision of this brief, the exercise of the trial court's discretion in granting or refusing allowances will not be reviewed, in the absence of a showing of an abuse of such discretion. And, in the appellant's brief, there is no appearance of any showing of any such abuse. In fact, the record clearly shows that the services rendered by the attorneys for the appellant were not such as to have justified the granting of any allowance of either compensation or expenses, particularly since any allowance could have come from no source other than the bondholders' security.

We respectfully submit that there is no merit in the appellant's complaint of the refusal of the trial court to make any allowance to the appellant's attorneys.

CONCLUSION.

We respectfully submit that the decree dismissing the proceeding, and the orders dealing with allowances to counsel, should each be affirmed.

In the summer of 1931, the appellant refused to continue the operation of Hotel Oakland, the property that is subject to the bondholders' indenture and the only property belonging to the appellant. Since January, 1932, the property has been in the possession of a receiver appointed by the state court in an action prosecuted by the trustee under the bond indenture (except during the period that the same person held the property as temporary trustee appointed herein).

During this period of nearly four and one-half years, the bondholders have assumed sole responsibility for the operation and protection of the property, in an effort to minimize as much as possible their already heavy loss. The bondholders have received no interest since January 1, 1931—a period of nearly five and one-half years. The appellant alleges that their bonds are selling at thirty cents on the dollar—less than enough to pay the delinquent interest.

The appellant is hopelessly bankrupt. According to its own showing, it has neither assets nor the possibility of assets sufficient to enable it to deposit the cost of printing the record on its appeal. There is not even a remote possibility of its reorganization. And the further prolongation of these proceedings cannot result in any legitimate advantage to it. It can only serve to place further obstacles in the way of the realization by the bondholders of a part of that to

which they are entitled, as a result of their investment in the appellant's bonds.

An affirmance of the decree and of the orders, from which the appeals are prosecuted, would appear to be required, by the undisputed facts, by the provisions of Section 77B, and by long-established rules governing appellate procedure.

Dated, Oakland,
June 12, 1936.

Respectfully submitted,
CHARLES A. BEARDSLEY,
ROBERT C. GREEN,
CHICKERING & GREGORY,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Appellees.

No. 7990

United States

Circuit Court of Appeals

For the Ninth Circuit.

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an insolvent corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Transcript of Record

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

ATTORNEYS OF RECORD

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Nogales, Arizona,
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In the District Court of the United States in and for the District of Arizona

L-654-Tucson

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation,
Plaintiff,

vs.

E. K. CUMMING,
Defendant.

COMPLAINT AT LAW

Suit to Collect Statutory Liability.

The plaintiff complains and for cause of action against the defendant alleges:

I.

That the Nogales National Bank of Nogales, Arizona, is a corporation, duly organized and exist-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

ing under the national banking laws of the United States of America, having a capital stock of Fifty thousand dollars ($50,000.00) divided into five hundred (500) shares of the par value of one hundred dollars ($100.00) per share, with its principal place of business in the city of Nogales, County of Santa Cruz, State of Arizona, and has at all times hereinafter mentioned been doing a general banking business in the said city of Nogales until on or about the thirtieth day of November, 1931, when said bank voluntarily suspended business, and that on or about the eleventh day of December 1931, the Honorable Comptroller of the currency of the United States, who since the suspension of business by said bank, had been in charge thereof, determined the same to be in an insolvent condition, and appointed a receiver therefor, that this said receiver C. L. Ezell failed to accept the said appointment as receiver and that thereafter on or about December 15th, 1931, the said Comptroller appointed as receiver therefor Edwin B. Patton who thereupon took charge of the business of the said bank for the purpose of liquidating its assets and winding up its affairs, and that the said Edwin B. [4] Patton thereafter on or about February 13th, 1932, resigned as receiver of the said bank whereupon on or about February 13th, 1932, the said Comptroller appointed W. J. Donald as receiver for the said bank for the purpose of liquidating its assets and winding up its affairs, and that the said W. J. Donald, the plaintiff herein, is

now the duly appointed, qualified and acting receiver thereof.

That the defendant is a resident of Santa Cruz County, State of Arizona.

II.

That heretofore and before the closing and suspension of business by said bank, the defendant, E. K. Cumming became and was the owner of and in possession of ten (10) shares of the capital stock of the said Nogales National Bank of Nogales, Arizona, of a par or face value of $100.00 per share, or a total of One thousand ($1,000.00) dollars of the capital stock of said corporation, the same standing on the books of said corporation in his name up to and on January 14th, 1932.

III.

That on or about the 14th day of January, 1932, the Honorable Comptroller of the Currency of the United States, being fully advised of the condition of the said bank, and for the purpose of paying the liabilities thereof, decided to and did levy an assessment upon the capital stock and stockholders of the said Nogales National Bank of Nogales, Arizona, to the full amount of the par value thereof, or the sum of One hundred dollars ($100.00) upon each and every share of the capital stock of the said corporation, held or owned by such stockholders respectively, at the time of the failure of the said bank

and upon all persons liable therefor under the provisions of Sections 5151 and 5234 of the Revised Statutes of the United States and Section 1, C,156, Act of June 30th, 1876, and Section 23 of the Act approved December 23rd, 1913, known as the Federal Reserve Act, and directed the said receiver, W. J. Donald, plaintiff herein, to take all necessary proceedings to enforce the liability of the said stockholders [5] a copy of which order of the said Comptroller is attached to the complaint, marked "Exhibit A", and is made a part hereof.

IV.

That on or about the thirtieth day of January, 1932, the plaintiff made demand upon the defendant herein for the payment, on or before February 23rd, 1932, of the amount so levied upon said shares of capital stock under the order of the said Comptroller of the Currency, to-wit: the sum of One Thousand dollars ($1,000.00) but that the defendant has failed to pay the said sum or any part thereof and by reason of the facts above set forth and the provisions of Section 23, of the act, approved December 23rd, 1913, known as the Federal Reserve Act, Laws of the United States, the whole of said sum is now due and owing from defendant to this plaintiff as Receiver of the said Nogales National Bank of Nogales, Arizona.

WHEREFORE, plaintiff prays judgment against defendant for the sum of One Thousand Dollars, together with the interest thereon at the rate of six

percent per annum from the 23rd day of February, 1932, until paid and for his costs in this suit expended.

STEPHEN D. MONAHAN,
Attorney for Plaintiff.

State of Arizona,
County of Santa Cruz—ss.

W. J. Donald, being first duly sworn, deposes and says: That he is the receiver in charge of the affairs of the Nogales National Bank of Nogales, Arizona, and the plaintiff herein, and makes this affidavit as such receiver: That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

W. J. DONALD.

Subscribed and sworn to before me by the said W. J. Donald this 11th day of January, 1935.

[Notarial Seal] J. FIGUERAS,
Notary Public.

My Commission expires Feb. 24, 1935. [6]

EXHIBIT A.

Copy of

ASSESSMENT UPON SHAREHOLDERS.

TREASURY DEPARTMENT
Office of the Comptroller
of the Currency.
Washington, January 14, 1932.

In the Matter of
The Nogales National Bank,
Nogales, Arizona.

TO ALL WHOM IT MAY CONCERN:

WHEREAS, upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The Nogales National Bank", Nogales, Arizona, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Sections 5151 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act.

NOW, THEREFORE, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The Nogales National Bank" for Fifty Thousand ($50,000.00) dollars, to be paid by them on or before the twenty-third day of February, 1932,

and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Edwin B. Patton the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

IN WITNESS WHEREOF I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fourteenth day of January, A. D. 1932.

[Seal] (Signed) JOHN L. PROCTOR,
Acting Comptroller of the Currency. [7]

[Endorsed]: Filed Jan. 12, 1935. [8]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant above named and in answer to plaintiff's complaint in the above entitled action, defendant demurs to said complaint for each of the following separate reasons and upon each of the following separate grounds, to-wit:

(1) That it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the provisions of Section 2058 of the Revised Code of 1928 of the State of Arizona.

(2) That it appears upon the face of said complaint that plaintiff's alleged cause of action is barred by the provisions of Section 227 of the Revised Code of 1928 of the State of Arizona.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that defendant have judgment against the plaintiff for his costs.

JAMES V. ROBBINS,
Trust Bldg.,
Nogales, Arizona,
DUANE BIRD,
THOMAS L. HALL,
La Ville de Paris Bldg.,
Nogales, Arizona,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 13, 1935. [9]

In the United States District Court for the District of Arizona.

May 1935 Term At Tucson

MONDAY, JUNE 10, 1935
(Tucson General Minutes)

Honorable Albert M. Sames, United States District Judge, Presiding.

L-654

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation,
Plaintiff,

vs.

E. K. CUMMING,
Defendant.

ORDER SUSTAINING DEMURRER AND DISMISSING CASE.

Defendant's Demurrer to the Complaint having heretofore been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

IT IS ORDERED that said Demurrer to the Complaint be and the same is hereby sustained and that this case be dismissed, and that an exception be entered on behalf of the Plaintiff.

[Title of Court and Cause.]

PETITION FOR APPEAL.

To: Honorable Albert M. Sames, Judge, United States District Court, District of Arizona.

Comes now the above-named plaintiff, W. J. Donald, Receiver, and feeling aggrieved by the decree of the above-entitled Court, made and entered in the above-numbered and entitled cause under date of the tenth day of June, 1935, sustaining the demurrer to the plaintiff's Complaint heretofore filed in said Court and cause, and dismissing the above-entitled action, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignments of Error, filed herewith; and

Said plaintiff does respectfully pray that his appeal be allowed and that the citation upon appeal issue as provided by law; and that a transcript of the record, proceedings and documents upon which said final decree was based, duly authenticated, be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, within said Circuit as does the law and the rules of such Court, in such cases made and provided, require. [11]

Said plaintiff further prays that whereas this appeal is made by direction of the Comptroller of the United States Currency, an order be entered directing that this appellant not be required to file a cost bond herein.

STEPHEN D. MONAHAN,
Attorney for Plaintiff.

We hereby accept service of written Petition for Appeal and acknowledge receipt of a true copy thereof at Nogales within the District of Arizona this 3d day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [12]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the plaintiff, W. J. Donald, Receiver, by Stephen D. Monahan, his attorney of record herein, and in connection with his Petition for Appeal, herewith filed, makes it known that in the record, proceedings and the decree appealed from, manifest error has intervened to the prejudice of this plaintiff in these things, to-wit:

1. The District Court erred in sustaining the demurrer to plaintiff's complaint, filed in the above entitled action, and in dismissing said action because said complaint was filed within the three year period as prescribed in Section 2060, Paragraph 1, and in Section 227, both of the Revised Statutes of Arizona, 1928;

By reason whereof, plaintiff prays that the decree appealed from may be reversed and remanded and

that an order for judgment for the plaintiff be entered in accordance with the law and the prayers in said complaint.

STEPHEN D. MONAHAN,
Attorney for Plaintiff. [13]

We hereby accept service of the foregoing assignments of error and acknowledge receipt of a true copy thereof at Nogales, within the District of Arizona, this 3d day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [14]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The plaintiff above named, having within the time prescribed by law, duly filed herein his Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the above entitled District Court, made and entered in the above numbered and entitled cause under date of the tenth day of June, 1935, sustaining the Demurrer of the defendants and dismissing plaintiff's Complaint and dismissing the action;

It is ordered that the plaintiff's appeal to the United States Circuit Court of Appeals for the

Ninth Circuit from the decree of the District Court hereinabove referred to, be, and the same is, hereby allowed;

It is further ordered that a certified transcript of so much of the record as may be requested by proper praecipe therefore be, by the Clerk of this Court, upon the filing of such praecipe, transmitted to said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

It is further ordered, that this Appeal having been directed by the Comptroller of the United States Currency, [15] that no bond be required.

Done in open court this 6th day of September, 1935.

ALBERT M. SAMES,
Judge, United States District Court.
District of Arizona.

We hereby acknowledge and accept service of the foregoing Order Allowing Appeal and acknowledge receipt of a true copy thereof at Nogales, wihin the District of Arizona, this 6th day of September, 1935.

DUANE BIRD,
THOMAS L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant.

[Endorsed]: Filed Sep. 6, 1935. [16]

[Title of Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above entitled Court:

YOU ARE HEREBY DIRECTED to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit and to include therein the following:

1. Plaintiff's Complaint to enforce stockholder's liability.

2. Demurrer of E. K. Cumming to Plaintiff's Complaint.

3. Decree sustaining Demurrer entered herein June 10th, 1935.

4. Plaintiff's Petition for Appeal, filed herein on the 6th day of September, 1935.

5. Plaintiff's Assignments of Error, filed herein on the 6th day of September, 1935.

6. Order Allowing Appeal, filed the 6th day of September, 1935.

7. Citation on appeal, filed on the 6th day of September, 1935. [17]

8. This Praecipe.

9. Notice of filing praecipe for record on appeal filed herein on the ..... day of September, 1935.

Dated this 6th day of September, 1935.

STEPHEN D. MONAHAN

Attorney for Plaintiff.

[Endorsed]: Filed Sep. 6, 1935. [18]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR RECORD ON APPEAL.

To the defendant E. K. Cumming and to Duane Bird, Thomas Hall, and James V. Robins, attorneys for defendant:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE THAT on the 6th day of September, 1935, the undersigned filed with the Clerk of the United States District Court for the District of Arizona a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, upon appeal taken by the said plaintiff in the above numbered and entitled cause, a copy of which praecipe is herewith served upon you.

Dated this 6th day of September, 1935.

STEPHEN D. MONAHAN
Attorney for Plaintiff. [19]

We hereby accept service of the above and foregoing notice and acknowledge receipt of a true copy together with a copy of the praecipe mentioned herein.

Sept. 6, 1935.

DUANE BIRD
THOS. L. HALL
JAMES V. ROBINS
Attorneys for Defendant.

[Endorsed]: Filed Sep. 7, 1935. [20]

In the United States District Court for the District of Arizona

United States of America,
District of Arizona.—ss.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation, Plaintiff, versus E. K. Cumming, Defendant, numbered L-654 Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 20, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $2.60 and that said sum has been paid to me by counsel for the appellant.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said Court this 16th day of September, 1935.

[Seal] J. LEE BAKER, Clerk,
U. S. District Court,
District of Arizona,
By EDWARD W. SCRUGGS,
Chief Deputy Clerk. [21]

[Title of Court and Cause.]

CITATION ON APPEAL

The President of the United States of America to E. K. CUMMING, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days from and after the date of this citation, pursuant to an order allowing the appeal duly made and entered and filed in the office of the Clerk of the above named district court, under date of the 6th day of September, 1935, which said appeal is from the final decree of said District Court in the above numbered and entitled cause, made and entered under date of the tenth day of June, 1935, wherein W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, a corporation, is plaintiff and appellant, and you are defendant and appellee, to show cause, if any there be, why said order and decree rendered against said plaintiff and appellant should not be reversed and set aside

and why justice should not be done to the parties in that behalf.

WITNESS the Honorable Albert M. Sames, United States District Judge for the District of Arizona, this 6th day [22] of September, 1935, A. D., and of the Independence of the United States of America the One Hundred sixtieth.

[Seal] ALBERT M. SAMES,
Judge of the United States District Court in and for the District of Arizona.

We hereby accept service of the within citation on appeal and acknowledge receipt of a true copy thereof and personal service of citation at Nogales, Arizona, this 6th day of September, 1935.

DUANE BIRD,
THOS. L. HALL,
JAMES V. ROBINS,
Attorneys for Defendant. [23]

[Endorsed]: No. 7990. United States Circuit Court of Appeals for the Ninth Circuit. W. J. Donald, Receiver of the Nogales National Bank of Nogales, Arizona, an insolvent corporation, Appellant, vs. E. K. Cumming, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 20, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7990

14

United States
Circuit Court of Appeals
For the Ninth Circuit

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an Insolvent Corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Brief of Appellant

STEPHEN D. MONAHAN,
Nogales, Arizona,
Attorney for Appellant.

TOPICAL INDEX

Page

Statement of the Case 1
Assignment of Errors 3, 4
Brief of the Argument 4
Conclusion 20

TABLE OF CASES

Page

Aaronson v. Pearson, 249 Pac. 188, 189 12
Adams v. Clark, 85 Pac. 642, 643 13
Austin v. Proctor, 291 S. W. 702, 703 19
Bernheimer v. Converse, 206 U. S. 516, 529, 530 10
Coffin Bros. v. Bennett, 277 U. S. 29, 72 L. Ed. 768 14
Colman v. Button, 42 Ariz. 141, 144, 22 Pac. (2d) 1078, 1079 ..... 13, 15
Concord Bank v. Hawkins, 174 U. S. 364, 372 8
Converse v. Hamilton, 224 U. S. 241, 253 10
Cowden v. Williams, 259 Pac. 670, 675 7
First Nat'l Bank vs. Kentucky, 9 Wal. 353, 362 7
First Nat'l Bank of St. Louis v. Missouri, 263 U. S. 640, 656 7
Fredericks v. Hammons, 33 Ariz. 310, 315, 264 Pac. 687, 689 ..... 11, 13
Gaiser v. Buck, 179 N. E. 1, 3, 5 5
Gordon v. Rhodes, 116 S. W. 40, 41, 42 18
Hiring v. Hamlin, 206 N. W. 617, 619 15
Howarth v. Angle, 56 N. E. 489, 492 15
Jones v. Canon, 3 Fed. Sup. 49, 50, 51 ..... 17, 20
Matteson v. Dent, 176 U. S. 521, 525 9
McClellan v. Chipman, 164 U. S. 347, 356 7
McLaine v. Rankin, 197 U. S. 154, 158, 160 ..... 5, 15
Mitche on Banks & Banking, Vol. 2, page 113 14
Oates v. First Nat'l Bank, 100 U. S. 239, 244 6
O'Connor v. Koch, 29 S. W. 400, 401 19
Payne v. Ostius, 50 Fed. (2d) 1039, 1042 20

Page

Rankin v. Barton, 199 U. S. 228, 231 4
Rankin v. Miller, 207 Fed. 602, 610 4
Richmond v. Irons, 121 U. S. 27, 56 8
Robinson v. Varnell, 16 Tex. 382 18
Rose v. First State Bank, 38 S. W. (2d) 863, 864 19
San Luis Obispo v. Gage, 73 Pac. 174, 177 15
Studebaker v. Perry, 184 U. S. 258, 263 4
Supervisors of Albany v. Stanley, 105 U. S. 305 6
Thompson on Corporations, 2d Ed. 4790 12
Van Tuyle v. Schwab, 161 N. Y. S. 323, 116 N. E. 1081 11
Washington Loan & Trust Co. v. Allman, 70 Fed. (2d) 282 ..... 16, 17
Wehby v. Spurway, 30 Ariz. 274, 246 Pac. 759 14
Whitman v. Bank, 176 U. S. 559, 563, 590 9
Whittier v. Visscher, 209 Pac. 23, 25 15

United States
Circuit Court of Appeals
For the Ninth Circuit

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an Insolvent Corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Brief of Appellant

STATEMENT OF THE CASE

On January 12, 1935, the present appellant, W. J. Donald, as receiver of the Nogales National Bank, an insolvent corporation, filed his complaint in the office of the Clerk of the United States District Court for the District of Arizona, at Tucson, Arizona. The complaint alleged the organization of the bank under the laws of the United States and its operation as such until November 30, 1931, the Comptroller of the U. S. Currency determined it to be in an insolvent condition and appointed a receiver therefor; that W. J. Donald was the duly appointed, qualified and acting receiver therefor; that the defendant, E. K. Cumming, the present appel-

lee, was on January 14, 1932, the owner of capital stock to the par value of $1000.00; that on January 14, 1932, the Comptroller levied an assessment of 100% on the stockholders; that on January 30, 1932, written demand was made on the defendant for payment on or before February 23, 1932; that the defendant failed to pay.

On February 12, 1935, defendant demurred to the complaint on the ground that the liability was barred by limitation. At the hearing, on May 18, 1935, it was stipulated that the facts as set forth in the complaint were as stated and accordingly no evidence was offered. The demurrer was thereupon argued. Defendant admitted that the liability was generally contractual but that for purposes of limitation it was statutory and that the bar of the statute fell one year from the accrual of the cause of action. Plaintiff's position was that in the absence of a limitation in National Banking laws the three year limitation provided for Arizona banks by a special banking limitation as set forth in Sec. 227, Rev. Stat. 1928, Arizona, applied to the present case. Also, that the obligation was such a debt as to bring it within the three-year limitation as provided in Sec. 2060, Par. 1, in actions of "debt, where the indebtedness is not evidenced by a contract in writing."

Also that the obligation of the stockholder was an implied contract with the creditors of the bank and as such was within the same three-year limitation as provided in the section 2060, paragraph 1, as above set out.

The court took the matter under advisement and on June 10, 1935, entered an order sustaining the demurrer and dismissing the case. Exception was entered on behalf of the plaintiff.

ASSIGNMENT OF ERROR

I.—The District Court erred in sustaining defendant's demurrer to plaintiff's complaint for the reason that

The complaint was filed within the three-year period prescribed in Sec. 227 of the Rev. Statutes of 1928, Arizona, and which is as follows:

> "The stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association, to the extent of the amount of their stock therein, in addition to the amount invested in such shares of stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver.
>
> The action to enforce such liability shall be commenced within three years after the closing of such bank, and may be commenced immediately upon the closing of the bank, if in the judgment of the superintendent or receiver, the assets of such bank are insufficient to meet its liabilities."

and that the above and foregoing Section 227 expresses the intention of the Arizona legislature to create a three-year limitation for bank stockholders' liability in the case of all banks in Arizona;

and that in the absence of a provision for limitation in national banking laws, the Federal Courts should adopt the limitation as provided in Arizona laws.

II.—The District Court erred in sustaining defendant's demurrer to plaintiff's complaint for the reason that the complaint was filed within the three-year period prescribed in Section 2060, paragraph 1, of the Rev. Stat. of 1928, Arizona, and which is as follows:

> "There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, the following actions:
>
> I—Debt, where the indebtedness is not evidenced by a contract in writing."

That the stockholder's contract of subscription is an implied contract with the bank's creditors to be liable to the extent provided by law for all debts and engagements of the bank;

and that regardless of the exact nature of the stockholder's liability it is a "debt" as contemplated by the section last above quoted.

BRIEF OF ARGUMENT

The stockholder's liability dates from assessment and demand by the Comptroller of the U. S. currency and no cause of action accrues until assessment and demand have been so made.

Rankin v. Barton, 199 U. S. 228, 231;
Studebaker v. Perry, 184 U. S. 258, 263;
Rankin v. Miller, 207 Fed. 602, 610.

In the instant case assessment was levied on Jan. 14, 1932, and on Jan. 30th, 1932, demand for payment on Feb. 23, 1932, was made. The complaint was filed on Jan. 12, 1935.

Sec. 227 hereinbefore set forth expresses the obvious intention of the legislature to provide a three-year limitation for bank stockholders' liability, and the language employed "the stockholders of *every* bank" (italics mine) indicate a desire to include all stockholders of every bank in Arizona.

The word "every" means just what it says: The general, rather than limited meaning of the word bank is intended.

Gaiser v. Buck, 179 N. E. 1, 3, 5.

Since Congress has provided no limitation for the liability of bank stockholders, the laws of Arizona as to limitation are to be applied.

> "In the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations for the particular state is applicable."
>
> McLaine v. Rankin, 197 U. S. 154, 158.

Inasmuch as there can be no right of action against the stockholders of a national bank until after assessment and demand by the Comptroller, it naturally follows that when sec. 227 (supra) is applied to the case of a national bank that closing, a loose expression at best, must be interpreted as assessment and demand.

The legislative intention to provide a three-year limitation in the case of *every* bank is thus carried out.

The intentions of the legislature should not be defeated by a too rigid adherence to a statute.

> Oates v. First Nat'l Bank, 100 U. S. 239, 244.
>
> "In a statute which contains valid and invalid provisions, that which is unaffected by those provisions or which can stand without them must remain. If the valid and invalid are capable of separation *only the latter are to be disregarded.*" (Italics mine.)
>
> Supervisors of Albany v. Stanley, 105 U. S. 305.

In the absence of a Federal statute of limitation for the double liability of national bank stockholders, a three-year limitation provided by state statutes can be applied without in any way interfering with the purposes of the Federal banks' creation, impairing its utility, or in any manner conflicting with Federal law. The provisions for a three-year limitation by the state is a definite, clear cut statement of the legislative intent as to stockholders of *every* bank in the state.

> "A National bank is subject to state law unless that law interferes with the purposes of its creation or destroys its efficiency or is in conflict with some Federal Law;"

and further

> "The doctrine of non interference with operations of a national bank protects the bank only from such legislation as tends to impair its utility as an instrument of the Federal Government."

First Nat'l Bank vs. Kentucky, 9 Wal. 353, 362;
McClellan v. Chipman, 164 U. S. 347, 356;
First Nat'l Bank of St. Louis v. Missouri, 263 U. S. 640, 656.

Anticipating the citing of Cowden v. Williams, 259 Pac. 670, 675, by appellee on this question of limitation, it is to be noted that the decision in that case was handed down prior to the adoption of the Arizona revised statutes of 1928, actually in 1929, and in particular, sec. 227 (supra) with its provisions for a three-year limitation. If the legislature has provided a three-year limitation for banks in this State Banking Act (sec. 227, supra), how can it be said that it intended a different period of limitation for national banks located within the state?

Sec. 227 above set out follows Section 5151 of the Rev. Stat. of U. S. almost word for word, except that Sec. 5151 provides no limitation. It would seem from the above cases that the Arizona three-year banking limitation as provided in Sec. 227 would naturally apply to any bank located in Arizona. Since national banking laws failed to provide a limitation for bank stockholders' liability it is not essential that the state laws on limitation express a clear cut intention to supply that particular omission before the Federal Courts will adopt the state limitation as controlling in the case of national banks located within the state. The fact that the national banking laws have not, and the state banking laws have such a limitation would seem to be sufficient warrant for Federal Courts to follow the state law.

THE OBLIGATION OF THE STOCKHOLDER IS AN IMPLIED CONTRACT WITH THE CREDITORS OF THE BANK AND AS SUCH IS WITHIN THE THREE-YEAR LIMITATION AS PROVIDED IN SECTION 2060, PARAGRAPH I, REVISED STATUTES ARIZONA 1928.

"Under the national banking act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect and be as binding in all respects as any other contracts of the individual stockholder."

Richmond v. Irons, 121 U. S. 27, 56; 30 L. Ed. 864, 873.

"The obligation is declared by statute to attach to the ownership of the stock and in that sense may be said to be statutory. But, as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Concord Bank v. Hawkins, 174 U. S. 364, 372; 43 L. Ed. 1007, 1011.

"The obligation of a subscriber to stock to contribute to the amount of his subscription for the purposes of payment of debts is contractual and arises from the subscription to the stock. . . . The obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

Matteson v. Dent, 176 U. S. 521, 525; 44 L. Ed. 573.

"It may be regarded as settled that, upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and as such, capable of being enforced in the courts, not only of that state but of another state and of the United States."

Whitman v. Bank, 176 U. S. 559, 563, 590.

Section 3, Article 10 of the Constitution of Minnesota, provides that: "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing business) shall be liable to the amount of stock held or owned by him." An action to enforce this stockholder's liability came before the U. S. Supreme Court on a writ of error to the Circuit Court for the Southern District of New York. In a very lengthy opinion the question as to the nature of this liability is clearly set forth. The court said:

"the obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each stockholder. It is substantially the procedure authorized by the National Banking Act except that the Comptroller of the Currency takes the place of the Court and without the presence of the stockholders makes a conclusive assessment. By becoming a member of a Minnesota corporation and assuming the liability attaching to such membership, he becomes subject to such regulations as the state might lawfully make to render the liability effectual. It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provisions, contractual in its nature, and as such capable of being enforced in the courts not only of that state but of another state and of the United States."

Bernheimer v. Converse, 206 U. S. 516, 529, 530; 51 L. Ed. 1163, 1174, 1175.

In a later case in the U. S. Supreme Court involving the same statute or rather, constitutional provision of the state of Minnesota, the court said:

"The provision is self executing and under it each stockholder becomes liable for the debts of the corporation in an amount measured by the par value of his stock. The liability is not to the corporation, but to the creditors collectively; is not penal, but contractual; is not joint, but several; and the mode and means of its enforcement are subject to legislative regulations."

Converse v. Hamilton, 224 U. S. 241, 253.

In the case of an action by the Superintendent of Banks for an assessment against the stockholders of the Bank of the U. S. the court said:

> "By article 8, sec. 7 of the Constitution (N. Y.) and sec. 120 and sec. 80 of the banking laws, stockholders of banking corporations are liable equally and ratably to the extent of the amount of their stock therein at the par value thereof for the debts and obligations of the bank. There is an implied contract voluntarily entered into by the stockholder upon his purchase of the stock of the corporation that he will be liable in the manner and to the extent prescribed by statute."

Van Tuyle v. Schwab, 174 App. Div. 665; 161 N. Y. S. 323, Aff'd 220 N. Y. 661; 116 N. E. 1081.

In the case of Fredericks v. Hammons, 33 Ariz. 310, 315, 264 Pac. 687, 689, while before the court primarily on a question of attachment, the court took advantage of the opportunity to pass on the nature of the stockholder's liability and the enforcement thereof. Inasmuch as the question of limitation goes to the remedy, the enforcement of the obligation, it seems impossible to escape the intendments of its decision that the liability is contractual and is to be enforced as such. On page 314 the court said:

> "The defendant contends that a stockholder's double liability does not arise out of a contract, but is statutory, and that at all events his liability is not for the direct payment of money. The first contention is not supported either by the text books or the decisions. According to these authorities, the stockholders' liability is contractual. The constitutional provisions at the time the defendant ac-

quired the stock was: the shareholders or stockholders of every banking or insurance corporation shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value therefor, in addition to the amount invested in such shares of stock. This definitely fixed defendant's obligation. In accepting the stock he impliedly agreed to abide by such law. It became and was a part of the contract he entered into and he voluntarily gave his consent to be bound thereby."

The court then quoted Aaronson vs. Pearson, 199 Cal. 286, 249 Pac. 188, the same principle being expressed in Thompson on Corporations, 2d Ed. 4790, as follows:

"This liability is not imposed on stockholders without their consent, for the reason that, where such statute or constitutional provisional exists when a person becomes a stockholder in a corporation, he impliedly at least agrees to become liable to the extent prescribed. In other words, such a provision, under familiar principles, becomes incorporated in and a part of the undertaking of the stockholder, and is, therefore, said to be the result of his stockholder's agreement and is contractual in its nature."

"The constitutional and statutory provisions relating to the liability of stockholders become essential terms of the subscription agreement of a stockholder as fully as if they were set forth at length therein. By accepting ownership of stock in a corporation, the stockholder in effect offers to make payment, to the extent of his stockholder's liability, to any person who may extend credit to the corporation, the offer and act (of extending

credit) combined makes a complete contract between the stockholder and the creditor."

Quoting Adams v. Clark, 85 Pac. 642, 643, it said:

"This liability, unlike the liability imposed by the statute upon directors or officers of a corporation for its debts, because of their fraud or negligence in the management of the affairs of the corporation, is not penal in its nature—not to be regarded as a purely statutory liability—it is a liability voluntarily assumed by the act of becoming a stockholder, and an obligation thus assumed, is purely contractual, contains all the elements of a contract, and is to be enforced as such."

Continuing, the court said:

"This law is so well settled that we deem it unnecessary to cite other authority."

Fredericks v. Hammons, 33 Ariz. 310, 315; 264 Pac. 687, 689.

Apparently this is the first time that the proposition, that a bank stockholder's double liability was incurred by an unwritten contract, has been passed upon by the Arizona Supreme Court, but since then the Arizona Courts have followed and adopted that view. This will be noted in another and still more recent case of Colman v. Button, 42 Ariz. 141, 144; 22 Pac. (2d) 1078, 1079, which was an action to enforce the added liability of a bank stockholder, and wherein the court said:

"Sec. 227 of the Arizona Revised Code of 1928, reads, in part, as follows: 'the stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for

all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares of stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver.' The first sentence of this section is practically a rescript of section 11 Article 14, of the state Constitution, which is almost word for word the same as section 5151 of the Revised Statutes of the United States (12 U. S. C. A. 63) concerning the statutory liability of stockholders in the national banks. Incorporated in the contract of every purchaser and owner of shares of stock in a banking corporation are the provisions of the above statutes. These provisions are a part of his contract and he thereby agrees to the extent of the amount of his stock to be responsible to the creditors of the bank for all its contracts, debts and engagements."

Citing:

Mitche on Banks and Banking, Vol. 2, page 113, and

Coffin Bros. v. Bennett, 277 U. S. 29.

Quoting further from Wehby v. Spurway, 30 Ariz. 274, 246 Pac. 759, the court said:

"The question of the liability of the stockholder was under the Federal statute because of the similarity of that statute to our sec. 227 (supra) the conclusion there reached is, we think, decisive of the question here. The defense in that case was that the stockholder had been induced to purchase his stock through the fraud of an officer of the bank, and we held that even though such offense

were true it would not relieve the stockholder of his contractual liability to the creditors of the bank."

Colman v. Button, 42 Ariz. 141, 144.

From these cases it can hardly be denied that in the opinion of the Arizona Supreme Court the liability of the stockholder is contractual. Following the much quoted case of McLaine v. Rankin, 197 U. S. 154, where the decision of the U. S. Court was based on state of Washington decisions that the stockholder's liability was not contractual, it would seem that the court would be constrained to follow the Arizona decisions that the obligation is contractual, an implied contract that would inevitably bring it within the three year limitation as set out in Sec. 2060, par. 1, Arizona Rev. Statutes of 1928, actually adopted in 1929.

Turning to the decisions of Supreme Courts of other states we find case after case asserting the contractual nature of the stockholder's obligation and that it is to be enforced as such.

Hiring v. Hamlin, 200 Iowa 1322, 1326, 206 N. W. 617, 619;

Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 492;

San Luis Obispo v. Gage, 139 Cal. 398, 405, 73 Pac. 174, 177;

Whittier v. Visscher, 189 Cal. 450, 209 Pac. 23, 25.

Again referring to Cowden v. Williams (supra) it is to be noted that the question of an implied contract, one

not in writing, was not even suggested to the court. There was bare mention of the bank charter being a written contract with a six-year limitation but the proposition was not urged and no authorities were cited. Certainly it can be said that until the case of Fredericks v. Hammons (supra) was before the Arizona Supreme Court that the question of whether or not the stockholder's liability was the result of an implied contract not in writing, had never been determined.

In the case of Washington Loan & Trust Co. v. Allman, 70 Fed. (2d) 282, the Circuit Court of Appeals quoted Fredericks v. Hammons (supra) as deciding that the liability of a stockholder in a bank organized under the laws of Arizona was contractual, and said:

> "Article 14, Section 11 of the Constitution of Arizona, provides that—The shareholders or stockholders of every banking or insurance corporation or association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock. The provision of the Arizona constitution to which we have referred has been considered by the Supreme Court of Arizona, and in the case of Fredericks v. Hammons (supra), was declared to be self executing and, without more, to impose double liability on all shareholders of a bank organized after its adoption. It is our duty to follow this construction. From this it follows that a purchaser of shares of stock in an Arizona bank voluntarily assumes, by the act of purchase, an obligation to become liable to the extent pro-

vided in the Arizona Constitution, *and such an obligation, obviously is contractual and may be enforced like any other contract.*" (Italics mine.)

Washington Loan & Tr. Co. v. Allman, 70 Fed. (2d) 282.

THE STOCKHOLDERS' LIABILITY OR OBLIGATION IS SUCH A DEBT AS WOULD BRING IT WITHIN THE PROVISIONS OF SECTION 2060, PARAGRAPH I, ARIZONA REVISED STATUTES OF 1928, AND WHICH IS AS FOLLOWS:

> "There shall be commenced and prosecuted within three years after the cause of action shall have accrued and not afterwards, the following actions:
>
> I—Debt, where the indebtedness is not evidenced by a contract in writing."

This statute is practically identical with Article 5526, Paragraph 4, of the 1925 Revised Statutes of Texas, and which is as follows:

> "there shall be commenced and prosecuted within two years 4—Actions for debt where the indebtedness is not evidence by a contract in writing."

It will be noted that the difference lies in the fact that the Texas statute provides for a two-year limitation and the Arizona statute provides for a three-year limitation.

In a recent Texas case, Jones v. Canon, 3 Fed. Supp. 49, 50, 51, which was an action to collect a national bank stockholder's 100% assessment, the court analyzed the case of McLaine v. Rankin (supra) and pointed out

that the decision in that case was based upon decisions by the Washington State Courts construing their own stockholders' liability as not contractual, whereas the Texas courts have held such liability to be contractual. By decisions of the Washington courts the word "liability" applied only to debts contractual in their nature. The Texas courts, however, with the same statute as Arizona's have held that the words "action for debt" embrace all liabilities payable in money only when not founded upon a writing, whether based upon a mere personal contract, a specialty debt, or a *strictly legislative liability.* (Italics mine.) Quoting from Gordon v. Rhodes, 102 Texas 300, 116 S. W. 40, 41, the court said:

> "It follows that if a cause of action be for a debt, in the sense of this statute, the debt need not be evidenced or founded upon contract at all to come within the two years statute."

The court further pointed out that in the case of Robinson v. Varnell, 16 Tex. 382, the Texas Supreme Court held that "action for debt" as used in the Texas limitation statute, is not the common-law action for debt in its strict literal interpretation.

Quoting another case in which the Texas banking Commissioner sought to collect a 100% assessment from a stockholder of an insolvent bank, the statute of limitations was pleaded as a defense. The court said:

> "The present action is for a debt not evidenced by a contract in writing. Article 5687, Revised Statutes of 1911, Texas, therefore applies, which provides that the action shall be commenced and prosecuted within two years after the cause of action has accrued."

Austin v. Proctor, 291 S. W. 702, 703.

It is to be again noted that this statute is like our Sec. 2060, paragraph 1, Rev. Stat. 1928. Quoting further:

> "In an older case, a suit to collect an improvement certificate issued by the City of Houston against the grantor of the defendant, the statute of limitations was pleaded. The court said:
>
> "Article 3203 requires actions for debt, where the indebtedness is not evidenced by contract in writing, to be brought within two years, and not afterward. . . . The word 'debt' as used in this article is not restricted to its technical or common-law meaning, but it has been declared by our Supreme Court to include any open, unliquidated claim for money."
>
> O'Connor v. Koch, 29 S. W. 400, 401.

In an action to enforce the statutory liability of bank officers for deposits made while the bank was insolvent, the Texas Supreme Court held that "the words 'actions for debt' embrace all liabilities in money only, when not founded upon a writing, whether upon a mere personal contract, or upon a specialty debt, or upon a strictly legislative liability."

Rose vs. First State Bank, 38 S. W. (2d) 863, 864.

Referring to the decision in Rose v. Bank (supra) the court said:

> "The effect of this decision and others cited is to hold that the words 'action for debt' embrace all liabilities payable in money only when not founded upon a writing, whether based upon a mere personal contract, a specialty debt or a strict legislative liability. It follows that if a cause of action be for debt in the sense of this statute, the debt need

not be evidenced by or founded upon a contract to come within the two years statute."

Jones v. Canon, 3 Fed. Supp. 49, 50, 51.

In the instant case the statute so definitely passed upon by the Texas court being virtually the same as the Statute of Arizona, it would seem that the Arizona Statute has the same meaning and that the stockholders' double liability is such a debt as falls within the provisions of Section 2060, Paragraph 1, 1928, Revised Statutes of Arizona.

Even in uncertain cases the tendency of recent decisions seems obvious, for in a seeming attempt to do substantial justice to depositors and other creditors of an insolvent bank, the Court, in a suit to enforce the liability of bank directors, said: "As between two limitations, if a substantial doubt exists, the longer, rather than the shorter period is to be preferred."

Payne v. Ostius, 50 Fed. (2d), 1039, 1042.

CONCLUSION

It is respectfully submitted that the judgment of the District Court sustaining the appellee's demurrer and dismissing the case be reversed with instructions to the trial court to enter judgment for the appellant.

STEPHEN D. MONAHAN,
Attorney for Appellant.

No. 7990

UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an Insolvent Corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Brief of Appellee

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TOPICAL INDEX

Page

Statement of the Case 1

Brief of Argument 2

Conclusion 19

Index
TABLE OF CASES

Page

Armstrong vs. McAdams, et al., 46 Fed. (2d) 931 ..... 4, 15

Bernheimer vs. Converse, 206 U. S. 516, 51 L. Ed. 1163 ..... 8, 9

Christopher vs. Norvell, 26 S. Ct. 502, 201 U. S. 216, 50 L. Ed. 732 14

Colman vs. Button, 42 Ariz. 141, 22 Pac. (2d) 1078 12

Concord Bank vs. Hawkins, 174 U. S. 364, 43 L. Ed. 1007 ..... 8, 9

Converse vs. Hamilton, 224 U. S. 241, 56 L. Ed. 749 9

Cowden vs. Williams, 32 Ariz. 407, 259 Pac. 670.... 13

Drain vs. Stough, 61 Fed. (2d) 668, 87 A. L. R. 490 (9th CC) 4, 8

Forest vs. Jack, 55 S. Ct. 370 ..... 4, 8

Fredericks vs. Hammons, 33 Ariz. 310, 264 Pac. 687 11

Glenn vs. Marbury, 145 U. S. 499, 12 S. Ct. 914..... 4

Hendrickson vs. Helmer, et al., 7 Fed. Supp. 627 (DC Ida.) 4, 7

Hiring vs. Hamlin, 200 Iowa 1322, 206 N. W. 617.... 10

Howarth vs. Angle, 162 N. Y. 179, 56 N. E. 489..... 10

Kennedy vs. California Savings Bank (Cal.) 31 Pac. 846 15

Laurent vs. Anderson, 70 Fed. (2d) 819 8

Matteson vs. Dent, 176 U. S. 521, 44 L. Ed. 575 ..... 5, 8, 9

Page

McClaine vs. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702 ..... 4, 5

Meek vs. Stein, 5 Fed. Supp. 656 8

Page vs. Jones, 7 Fed. (2d) 541 7

Rankin vs. Miller, 207 Fed. 602 4

Richmond vs. Irons, 121 U. S. 27, 30 L. Ed. 864 ..... 8, 9

San Luis Obispo vs. Gage, 139 Cal. 398, 73 Pac. 174 10

Studebaker vs. Perry, 148 U. S. 257, 46 L. Ed. 528 8

Whitman vs. Bank, 176 U. S. 559 ..... 8, 9

Whittier vs. Visscher, 189 Cal. 450, 209 Pac. 23 10

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Brief of Appellee

STATEMENT OF THE CASE

The appellant correctly states the case in his brief. The Nogales National Bank, a national banking association, voluntarily suspended business on November 30, 1931, and on December 11, 1931, was determined to be insolvent by the Comptroller of the Currency, who appointed a receiver therefor on December 15, 1931. On January 14, 1932, the Comptroller levied an assessment of one hundred (100%) per cent on the stockholders and on January 30, 1932,

made written demand on the appellee, E. K. Cumming, for payment of his assessment, amounting to One Thousand ($1000.00) Dollars, on or before February 23, 1932. The appellee failed to pay the assessment and on January 12, 1935, an action was commenced against the appellee to enforce payment of the assessment. The appellee (defendant) demurred to the complaint upon the ground that the action was barred by limitation. The demurrer was sustained and the case was dismissed, to which exception was entered by the plaintiff.

The complaint was filed more than one year after the assessment was levied and demand was made for its payment, but less than three years after the assessment was levied and its payment demanded.

BRIEF OF ARGUMENT

The appellant contends that the action was not barred by limitation because of the provisions of Sections 227 and 2060 of the Revised Code of 1928 of the State of Arizona, which provide as follows:

> "Sec. 227. STOCKHOLDERS' LIABILITY. The stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, of such corporation or association, to the extent of the amount of their stock therein, at par value thereof, in addition to the amount invested in such shares or stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability

of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver. The action to enforce such liability shall be commenced within three years after the closing of such bank, and may be commenced immediately upon the closing of the bank if in the judgment of the superintendent or receiver the assets of such bank are insufficient to meet its liabilities.

"Sec. 2060. THREE YEAR LIMITATIONS. There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, the following actions: **1. Debt where the indebtedness is not evidenced by a contract in writing;** 2. upon stated or open accounts other than such mutual **and current** accounts as concern the trade of **merchandise** between merchant and merchant, their factors or agents; provided, that no item of any stated or open account shall be barred under the provisions hereof, so long as any item thereof shall have been incurred within three years immediately prior to the commencement of any action thereon; 3. for relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Italics ours.)

The appellee contends that the action was barred by Section 2058 of the Revised Code of 1928 of the State of Arizona which provides as follows:

"Sec. 2058. ONE YEAR LIMITATION. There shall be commenced and prosecuted with-

in one year after the cause of action shall have accrued, and not afterward, the following actions: 1. For malicious prosecution, or for false imprisonment, or for injuries done to the character or reputation of another by libel or slander; 2. for damages for seduction or breach of promise of marriage; 3. **upon a liability created by statute, other than a penalty or forfeiture.**" (Italics ours.)

It is undisputed that the superadded liability of a stockholder of an insolvent national bank commences to run when the assessment is made by the Comptroller of Currency.

Forrest vs. Jack, 55 S. Ct. 370;
McClaine vs. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702;

Glenn vs. Marbury, 145 U. S. 499, 12 S. Ct. 914;

Armstrong vs. McAdams, et al., 46 Fed. (2d) 931;

Drain vs. Stough, 61 Fed. (2d) 668, 87 A. L. R. 490 (9th CC);

Hendrickson vs. Helmer, et al., 7 Fed. Supp. 627 (DC Ida.)

It is further undisputed that the Federal statutes contain no provision limiting the period within which suit upon such liability must be instituted, and as a consequence the state statutes of limitation apply.

McClaine vs. Rankin, supra;
Rankin vs. Miller, 207 Fed. 602;
Armstrong vs. McAdams, et al., supra.

Therefore, it only remains to determine whether,

for the purpose of the matter now being considered, this suit was "upon a liability created by statute other than a penalty or forfeiture", or was an action upon a "debt not evidenced by a contract in writing", or was governed by the provisions of Section 227 of the Arizona Code above quoted, which applies to state banks. If the suit was one upon a liability created by statute, the statute of limitations had run and the demurrer was properly sustained for the reason that the suit was filed more than one year after the cause of action accrued. If this action is not a suit upon a liability created by statute other than a penalty or forfeiture, the statute of limitations had not run and the demurrer was improperly sustained.

The Supreme Court states in Matteson vs. Dent, 176 U. S. 521, 525, 44 L. Ed. 573:

"It is not imposed by way of forfeiture or penalty."

In all cases involving a statute of limitation, in which it became necessary to determine if the liability is contractual or one imposed by statute, the courts have uniformly held that the liability is one created by statute.

McClaine vs. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, was an action to enforce the personal liability of a shareholder in a national bank under Section 5151 of the U. S. Revised Statutes. The statute of limitation of the State of Washington was involved, the sole question then being, as now, was the action one upon a contract or upon a liability created by statute? The Supreme Court held that the

action was one upon a liability created by statute, stating:

> "It is contended that the meaning of the word 'liability' as used in that subdivision is not restricted to contract liabilities, but, reading it with subd. 2 of Section 4798, and in view of the enumeration of other actions to enforce liabilities, we think that this cannot be so, and, indeed, the subdivision has been construed by the supreme court of Washington as applicable only to contracts. Suter v. Wenatche Water Power Co. 35 Wash 1., 76 Pac. 298; Sargent v. Tacoma, 10 Wash. 212, 38 Pac. 1048. The circuit court was of that opinion when the case was originally disposed of, and held that the cause of action arose by force of the statute, and did not spring from contract. 98 Fed. 378. But that judgment was reversed by the circuit court of appeals on the ground that the liability was not only statutory, but contractual as well, and that the limitation of three years applied in the latter aspect. 45 C. C. A. 631, 106 Fed. 791. Conceding that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual, does it follow that an action given by statute should be regarded as brought on simple contract, or for breach of a simple contract, and, therefore, as coming within the provision in question?
>
> " * * * 'In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association.'
>
> "It is true that in particular cases the liability has been held to be, in its nature, contractual,

yet, it is nevertheless conditional, and enforceable only according to the Federal statute, independent of which the cause of action does not exist; so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions.

" * * * The statute of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability, and not an action for breach of contract."

In Page vs. Jones, 7 Fed. (2d) 541 at 544, Judge Sanborn states:

"The double liability of a shareholder of a national bank under section 9689 for the payment of its debt is entirely statutory. It attaches, exists, and is enforceable and dischargeable at the times, in the maner, and for the purpose specified in the act of Congress. It attaches and exists for the purpose of creating a fund for the exclusive purpose of paying the creditors of the bank equably and ratably."

In Hendrickson vs. Helmer, et al., 7 Fed. Supp. 627 (DC Ida.), Judge Cavanah states:

"The demurrer to the complaint presents the principal question as to whether the relationship existing by reason of the bankrupt purchasing the stock was statutory or contractual and whether there was a debt or demand existing at the time of the transfer of the property by the bankrupt to his wife, or not until the bank had failed and the assessment made.

"The liability of a shareholder in a national bank to respond to an assessment in case of in-

solvency as prescribed by section 54, title 12 USCA, **is statutory,** and, upon the failure of the bank, the rights of its creditors intervene and attach. Scott v. Deweese, 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822; Concord First National Bank vs. Hawkins, 174 U. S. 364, 19 S. Ct. 139, 43 L. Ed. 1007; Salter v. Williams, et al. (D. C.) 219 F. 1017. It is for the benefit of the bank's creditors represented by the receiver of the bank, and is conditional and contingent, and the right to sue does not obtain until the Comptroller has acted, which is the basis of the suit. McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500". (Italics ours.)

See also:

Forest vs. Jack, 55 S. Ct. 370;

Drain vs. Stough, 61 Fed. (2d) 668, 87 A. L. R. 490 (9th CC);

Laurent vs. Anderson, 70 Fed. (2d) 819;

Meek vs. Stein, 5 Fed. Supp. 656;

Studebaker vs. Perry, 148 U. S. 257, 46 L. Ed. 528.

Counsel for appellant quotes the following cases as authoritative upon the proposition that a stockholder's superadded liability is contractual rather than a liability created by statute:

Richmond vs. Irons, 121 U. S. 27, 30 L. Ed. 864;

Concord Bank vs. Hawkins, 174 U. S. 364, 43 L. Ed. 1007;

Matteson vs. Dent, 176 U. S. 521, 44 L. Ed. 573;

Whitman vs. Bank, 176 U. S. 559;

Bernheimer vs. Converse, 206 U. S. 516, 51 L. Ed 1163;

Converse vs. Hamilton, 224 U. S. 231, 56 L. Ed. 749.

In Richmond vs. Irons, supra, under the Illinois statute, there considered, the question did not arise as to whether the obligation was one imposed by statute.

In Concord Bank vs. Hawkins, supra, Matteson vs. Dent, supra, Whitman vs. Bank, supra, or Converse vs. Hamilton, supra, a statute of limitation was not involved or considered.

In Bernheimer vs. Converse, supra, cited by appellant, the court had no occasion whatsoever to decide or pass upon the question now before this Court, the only points there considered being as follows: Was the obligation impaired by later legislative action making the remedy more effectual; did the period of limitation apply which provided for bringing an action against a stockholder for a debt of the corporation within two years after he ceased to be a stockholder This case holds that the stockholder's liability arises by reason of the constitution of Minnesota, and that although the obligation is contractual in nature and is incurred upon the acquisition of the stock, that it springs primarily from the law whereby it is created. The court states:

> "It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman v. National Bank, 176

> U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and **springs primarily from the law creating the obligation** (Christopher v. Norwell, 201 U. S. 216, 50 L. Ed. 732, 26 Sup. Ct. Rep. 502.)" (Italics ours.)

In Hiring vs. Hamlin, 200 Iowa 1322, 206 N. W. 617, and Howarth vs. Angle, 162 N. Y. 179, 56 N. E. 489, cited by appellant, a statute of limitations was not involved and the courts were therefore not called upon to determine if the action was one upon a liability created by statute as distinguished from the obligation of an implied contract.

Whittier vs. Visscher, 189 Cal. 450, 209 Pac. 23, involved only the question of whether or not the stockholder's superadded liability was sufficiently contractual in nature to support a counterclaim in a suit upon a promissory note.

In San Luis Obispo vs. Gage, 139 Cal. 398, 73 Pac. 174, the court states on page 177:

> "The claim in controversy does not arise upon any express formal contract inter partes between the plaintiff on the one hand and the state of California on the other. It arises, if at all, from the effect of the act of 1880, and the subsequent performance by the respondent of the conditions which bring it within the terms of the statute. It is, in one sense, a liability arising from a statute; but it does not follow that it may not, nevertheless, be a contract. Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence. Thus, it is held

> in Kennedy v. Bank, 97 Cal. 96, 31 Pac. 846, 33 Am. St. Rep. 163, that the statutory liability of a stockholder in a corporation to pay his proportion of a debt due from the corporation, itself, is a contract within the meaning of the law which limits the right of attachment to actions upon a contract. And in Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031, it was held that this statutory liability 'is an obligation arising upon contract within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court, in actions arising upon contracts,' where the amount claimed is less than $300. In Hillsborough County v. Londonderry, 43 N. H. 451, an action to recover money, paid by a county for the support of a pauper, against the town which was made especially chargeable for his support by the statute, was held to be a case wherein the law implied a contract to make the payment, and that therefore an action of assumpsit would lie. It seems to be well settled 'that the general rule is that, for money accruing due under the provisions of a statute, the action of assumpsit may be supported, unless another remedy is expressly given.' "

The suit was brought by a county against the state for the support of orphans, under appropriate statutory provisions.

It is apparent that none of the above mentioned cases relied upon by appellant are authoritative upon the point of law now being considered.

Appellant places great reliance upon Fredericks vs. Hammons, 33 Ariz. 310, 264 Pac. 687. In that case, also, the statutory nature of the obligation was not

considered or questioned. The Arizona Supreme Court held that a stockholder's double liability constitutes such a "contract for the direct payment of money" as will support an attachment. The Arizona statute upon attachment (Sections 4241 to 4257 of the 1928 Code) divides causes of action into two classes: action upon a contract, express or implied, and actions for damages. Not being an action for damages, a stockholder's liability must necessarily be considered an action upon an implied contract for the purpose of attachment. The Arizona statute on garnishment (Section 4258 of the 1928 Code) provides that a writ of garnishment may issue where the plaintiff sues for a debt, and defines the term "debt" as being every claim or demand for money not arising from tort. Not being a demand arising from tort, an action upon a stockholder's double liability is clearly a debt under the definition of the statute.

Colman vs. Button, 42 Ariz. 141, 22 Pac. (2d) 1078, relied upon by appellant, holds that a stockholder in a state bank, under the provisions of the statute and the constitution, impliedly agrees to the extent of the amount of his stock to be responsible for the debts of the bank, even though his stock certificate was wrongfully withheld from him. The following quotation from the first paragraph of the decision is interesting:

> "This is an action by James B. Button, superintendent of banks, to enforce the **constitutional and statutory liability** of C. H. Colman as a stockholder of the Yuma Valley Bank, in course of liquidation." (Italics ours.)

Appellant's statement on page 15 of his brief that the Arizona decisions hold the obligation to be contractual is misleading. When the Arizona Supreme court has considered the general nature of such an action as arising from contract or tort, it has declared it to be contractual under some circunstances because of the implied contract connected with every subscription for bank stock. Nevertheless, the liability of the stockholder, although quasi-contractual, is wholly dependent upon the statute which imposes such liability. But when squarely confronted with the question now before this Court, the Arizona Supreme Court has declared that the cause of action is based upon a liability created by statute and the one year statute of limitation applies. The court states in Cowden vs. Williams, 32 Ariz. 407, 259 Pac. 670:

> "The second and more difficult question is the application of the statute of limitations. It is contended by appellants that the action is governed by subdivision 3, paragraph 709, Revised Statutes of Arizona, 1913, Civil Code, which reads as follows:
>
> '709. There shall be commenced and prosecuted within one year after the cause of action shall have accrued * * *
>
> '(3) An action upon a liability created by statute, other than a penalty or forfeiture.'
>
> "Appellee suggests that, since the charter of the bank, as well as the constitutional provision, imposes the double liability, it may be that the case is within the six-year provision of the statute (Civ. Code 1913, Sec. 714, as amended by Laws 1917, chap. 76, Sec. 2), refer-

ring to contracts in writing. He does not, however, urge this point or cite any authorities in support thereof, and we are satisfied it is not well taken. The matter is governed by subdivision 3, paragraph 709, supra."

Courts have held such an obligation to be quasi-contractual because of the implied agreement or submission of the stockholder to the statutory provision. But the apparent contradiction, after considering only that one phase of the subject, is not real and disappears when thought is directed to the statutory nature of the action, as stated in Christopher vs. Norvell, 26 S. Ct. 502, 201 U. S. 216, 50 L. Ed. 732:

"The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although, contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liabilty for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each share-

holder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. First National Bank v. Hawkins, 174 U. S. 364, 372, 43 L. Ed. 1007, 1011, 19 Sup. Ct. Rep. 739; Whitman v. National Bank, 176 U. S. 559, 565, 566, 44 L. Ed. 587, 591, 592, 20 Sup. Ct. Rep. 477; Matteson v. Dent, 176 U. S. 521, 44 L. Ed. 571, 20 Sup. Ct. Rep. 419. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute.

" '* * * **In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied** from the express contract of the stockholders to take and pay for shares in the association' " (Italics ours.)

In Armstrong vs. McAdams, et al., 46 Fed. (2d) 931, the Circuit Court of Appeals, Eighth Circuit, held that an action against a stockholder of a national bank is not contractual and is not barred by the Arkansas statute of limitations concerning actions upon contracts in writing. Apparently the State of Arkansas does not have a statute of limitation similar to the one year statute of Arizona.

In Kennedy vs. California Saving Bank, (Cal.) 31 Pac. 846, the California Supreme Court holds that the personal liability of a stockholder for his portion of the corporate debts is contractual in that an action thereon will support an attachment; but the court also considers the other phase of the proposition and states:

"In the case of Dennis v. Superior Court, above cited, the question whether an action like this was one arising upon contract was directly involved, and we there said: 'We think that the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money when the amount claimed is less than $300.' The views here expressed are not in conflict with what was decided in Green v. Beckman, 59 Cal. 545, and the other cases following it which are relied upon and cited by defendant. In those cases the question was whether an action like this against a stockholder was upon a 'statutory liability', within the meaning of section 359 of the Code of Civil Procedure, which provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within the time there specified. The court, in Green v. Beckman, supra, held that it was; that the legislature must have intended the section to apply to such an action; otherwise it was meaningless, in so far as it related to actions against stockholders. The court in that case said: 'The construction of section 359 of the Code of Civil Procedure is not free from difficulty. * * * Our attention has not been called to any provision of the statute which imposes any 'penalty' or 'forfeiture' upon a stockholder for any act as such, and no effect can be given to the words 'liability created by law', unless we apply it to the liability which

> the law imposes when one becomes a stockholder, and thus establishes the relation to the creditors of the corporation to which the law affixes the responsibility.' There is no intimation in this language, nor did the court there intend to hold, that such an action might not also be regarded as based upon 'contract', within the general meaning of that phrase, or as used in other chapters of the Code of Civil Procedure; but the court simply held that for the purposes of that section, and in the connection in which they there appear, the words 'liability created by law' should be construed as referring to actions, such as this, to enforce the liability of stockholders."

The State of Texas lacks a statute similar to the one year statute of Arizona for which reason we deem it unnecessary to consider the Texas cases quoted by appellant.

We, therefore, submit that, insofar as this action is concerned the obligation of the appellee is a liability created by statute and is barred by the one year statute.

Appellant's argument that in any event the limitation of three years as provided in the Arizona Banking Act (Section 227 of the 1928 Code) should apply to this case is destroyed by the following quotation stated on page 6 of appellant's brief in support of that argument:

> "A National bank is subject to state law **unless that law interferes with the purpose of its**

creation or destroys its efficiency or is in conflict with some Federal law;" (Italics ours.)

Section 227 is a part of the Arizona Banking Code and applies only to state banks. Every section and paragraph in the act is aimed at state banks. The language of the act positively excludes from its provisions every bank that is not organized and doing business pursuant thereto. Nearly every section of the act conflicts with the National Banking Act, and an attempt to apply the State act to a national bank would "destroy its efficiency" and "conflict with some Federal Law". This is especially true of Section 227. The additional liability of the stockholder, according to Section 227, must be enforced by the state superintendent of banks or the receiver, not by the Comptroller of the Currency. This is in direct conflict with the Federal law. The provisions of Section 227 are irreconcilable with the Federal law respecting appointment of a receiver, assessment of the stockholder, and enforcement of payment. Section 227 provides that an action to enforce a stockholder's double libility shall be commenced within three years after the closing of the bank, with the effect that the statute commences to run upon the "closing" of the bank, while under the Federal law the statute commence to run when the Comptroller of the Currency makes the assessment. Appellant's effort to favor himself with the provisions of Section 227 works to his disadvantage for the reason that this action was not commenced within three years after the Nogales National Bank was closed on November 30, 1931.

Although it is fundamental and elementary that

a single phrase of a statute may not be isolated and applied in exclusion of other provisions, appellant refuses to accept the portion of Section 227 which is unfavorable to him, but insists that the part which is favorable to him should apply. His effort to favor himself with the three year period under Section 227 is accompanied by his rejection of that part of Section 227 which provides that the statute begins to run the day the bank is closed. With like propriety the appellee could argue that the action is barred by Section 227 because not brought within three years after the bank closed, which, however, we refuse to do in view of the utter inapplicability of that statute.

CONCLUSION

For the reasons herein advanced, we respectfully submit that appellant's cause of action was barred by the one year statute of limitations, the demurrer was properly sustained, and the action of the District Court should be affirmed.

Respectfully submitted,

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